Supreme Court, U.S.
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No. 02-___

In The Supreme Court of the United States

DAIMLERCHRYSLER SERVICES NORTH AMERICA LLC,

Petitioner,

v.

MICHAEL F. POWE and THERESA MOORE BALLARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Do Fed. R. Civ. P. 23(f) and Fed. R. Bankr. P. 7023 provide for a discretionary appeal to the courts of appeals from a class action certification order entered by a bankruptcy judge?

2. Does this Court have the power, under 28 U.S.C. § 1292(e), to prescribe rules providing for an appeal to the courts of appeals of an interlocutory decision entered by a bankruptcy judge?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to this case. However, the petition seeks review of a judgment of the United States Court of Appeals for the Eleventh Circuit dismissing three petitions for permission to appeal orders granting class action certification in three different bankruptcy cases.

The parties to the two other petitions dismissed by the same judgment of the Court of Appeals are:

Case No. 01-90039-B:

Defendant-Petitioner: First Union Mortgage Corporation
Plaintiff-Respondent: Betty Ann Dean

Case No. 01-90060-C:

Defendant-Petitioner: PNC Mortgage Corp. of America
Plaintiffs-Respondents: Reth Allen Smith and Sherry Ryland Smith

CORPORATE DISCLOSURE STATEMENT

DaimlerChrysler Services North America LLC is the successor by merger to Chrysler Financial Company L.L.C., which was sued in this case under its former corporate name, Chrysler Financial Corporation.

DaimlerChrysler Services North America LLC, a Michigan limited liability company, is a wholly owned subsidiary of DaimlerChrysler Corporation, a Delaware corporation, which is a wholly owned subsidiary of DaimlerChrysler Motors Company LLC, a Delaware limited liability company, which is a wholly owned subsidiary of

CORPORATE DISCLOSURE STATEMENT – Continued

DaimlerChrysler North America Holding Corporation, a Delaware corporation, which is a wholly owned subsidiary of DaimlerChrysler AG, a publicly held corporation organized under the laws of the Federal Republic of Germany.

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PETITION FOR A WRIT OF CERTIORARI

DaimlerChrysler Services North America LLC (hereafter referred to by its former acronym "CFC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit dismissing CFC's first Rule 23(f) petition and its subsequent order dismissing CFC's second petition.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported under the name *Chrysler Financial Corporation v. Powe* at 312 F.3d 1241 (11th Cir. 2002). App. 1. The orders of the district court denying CFC's petitions for leave to appeal under 28 U.S.C. § 158(a) are unreported, App. 13-20, as is the order of the court of appeals dismissing CFC's second Rule 23(f) petition for lack of jurisdiction, App. 12. The orders of the bankruptcy court are unreported, App. 21-149, except for the order reported under the name *Noletto v. NationsBanc Mortgage Corp. (In re Noletto)* at 244 B.R. 845 (Bankr. S.D. Ala. 2000), App. 124-49.

JURISDICTION

The court of appeals entered its judgment on November 19, 2002. This petition is filed less than 90 days later as required by Supreme Court Rule 13. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. § 1292(e) (1993):

(e) The Supreme Court may prescribe rules in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 2072 (1994):

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 U.S.C. § 2075 (Supp. 2002):

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed

under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

Fed. R. Civ. P. 23(f) (Supp. 2002):

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Bankr. P. 7023 (1984):

Rule 23 F.R.Civ.P. applies in adversary proceedings.

Fed. R. Bankr. P. 9032 (Supp. 1984-2001):

The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules.

STATEMENT OF THE CASE

In 1998, respondents Michael F. Powe and Thesesa Moore Ballard filed separate petitions for relief under chapter 13 of the Bankruptcy Code. App. 92, 93, 96. Powe and Ballard each owned a car that was collateral for a debt he or she owed petitioner CFC. App. 93, 96.

CFC filed proofs of claim in respondents' bankruptcy cases, stating the total amount CFC asserted was or would be due over the course of the chapter 13 plan. App. 93, 96. The proofs of claim also noted "includes $225.00 atty. fee" or "includes attorney's fees of $225." *Ibid.* Chapter 13 plans were confirmed in respondents' cases. Each provided for payment of CFC's full claim, including the attorneys' fees, over the life of the plan. App. 94, 96.

On July 1, 1999, respondent Powe filed the adversary proceeding from which this petition arises. App. 54. In a complaint assertedly brought on behalf of a nationwide class of debtors, Powe alleged that CFC violates various provisions of the Bankruptcy Code by including attorneys' fees in its proofs of claim, by not separately obtaining judicial approval of those fees, and by collecting them from Powe and other debtors. App. 90, 103-109.

In February 2000, the bankruptcy judge issued an order in this and five other similar cases, denying defendants' motions to dismiss and holding that the court had subject matter jurisdiction as a "core" proceeding in bankruptcy, not only over the named plaintiffs' claims, but also over the claims of all putative class members, including debtors whose bankruptcy cases were pending or had previously been resolved in districts other than the Southern District of Alabama. App. 125, 146-49; *Noletto v. NationsBanc Mortgage Corp. (In re Noletto)*, 244 B.R. 845, 856-58 (Bankr. S.D. Ala. 2000).

On January 18, 2001, respondent Ballard made a lump sum payment to complete her chapter 13 plan and received a discharge. App. 55. The following day she filed a motion to intervene in Powe's adversary proceeding. *Ibid.*

The motion was granted. Her complaint in intervention tracked Powe's allegations.

On June 1, 2001, the bankruptcy judge issued an order granting respondents' motion for class certification under Fed. R. Civ. P. 23(b)(2). App. 121, 123. The order reaffirmed the court's assertion of subject matter jurisdiction over claims of debtors whose bankruptcy cases had been filed in other districts, but stopped short of exercising that jurisdiction, postponing for later decision the definition of the class, including what districts it would cover, if any, outside the court's own. App. 118, 121-22.

On June 11, 2001, CFC filed a motion in the district court seeking leave to appeal from that order pursuant to 28 U.S.C. § 158(a). The district court denied leave on July 11, 2001, finding that the proposed appeal did not meet 28 U.S.C. § 1292(b) standards for interlocutory appeal. App. 19-20.

After further briefing and hearing, the bankruptcy judge issued an order on July 27, 2001, defining a nationwide class of debtors in whose chapter 13 cases CFC had filed proofs of claim that included amounts for attorneys' fees but either did not disclose those fees at all or did not disclose them "with sufficient specificity." App. 90.

On August 6, 2001, CFC filed a new motion in the district court seeking leave to appeal from that order pursuant to 28 U.S.C. § 158(a). That motion was denied on August 27, 2001, also for failing to meet 28 U.S.C. § 1292(b) standards. App. 17-18.

Also on August 6, 2001, CFC filed a petition in the court of appeals, seeking leave to appeal under Fed. R. Civ. P. 23 and Fed. R. Bankr. P. 7023. Respondents filed an

opposition to the petition. CFC supplemented its petition after the district court denied its second motion for leave to appeal.

On September 7, 2001, the court of appeals ordered the parties to submit further briefing on the "jurisdictional question" of whether a party may petition the court of appeals for review of either a bankruptcy judge's class action certification order or a district court's order denying leave to appeal from such an order. The parties complied. Thereafter, the court of appeals stayed appellate proceedings pending resolution of the same "jurisdictional question" in another similar case. That case settled. In July 2002, the court of appeals heard oral argument in this case and two others on the "jurisdictional question" only.

While CFC's Rule 23(f) petition was pending in the court of appeals, a trial was held in the underlying adversary proceeding. On May 10, 2002, the bankruptcy judge entered an order granting CFC judgment and decertified the nationwide class.[1] App. 85-86.

On July 3, 2002, the bankruptcy judge granted, in part, respondents' motion to alter or amend judgment. App. 51. It reopened discovery and presentation of evidence with respect to the assertion that, in districts other

[1] The bankruptcy judge found CFC had adequately disclosed its attorneys' fees in its proofs of claim – thus collapsing the nationwide class of debtors to whom fees had not been disclosed "with sufficient specificity" to a null set. It also granted CFC's motion to decertify the class "to the extent of limiting the class to debtors in the Southern District of Alabama as to [the only other issue, namely] the reasonableness of a specific fee," on which the bankruptcy judge also found in CFC's favor. App. 73, 80-82, 85.

than the Southern District of Alabama, CFC had included amounts for attorneys' fees in its proofs of claim but had not adequately disclosed that fact on the face of the proofs of claim or in another manner.[2] App. 47, 51. On August 23, 2002, the bankruptcy judge entered further orders "reconstituting" the plaintiff class and denying CFC's motion to dismiss further class action proceedings on the ground that respondents were no longer typical or adequate class representatives, their claims having been finally adjudicated to be without merit. App. 37, 41-42.

Within ten days, CFC filed a Rule 23(f) petition from the August 23 order reconstituting the class and again moved for leave to appeal the order to the district court under 28 U.S.C. § 158(a). The district court denied leave to appeal, again finding the proposed appeal did not meet 28 U.S.C. § 1292(b) standards. App. 15.

On November 19, 2002, the court of appeals entered its judgment dismissing the first of CFC's Rule 23(f) petitions. App. 1, 11. The court of appeals held that it could not entertain an appeal from a bankruptcy judge's order granting class action certification. Despite Fed. R. Bankr. P. 7023, which applies Fed. R. Civ. P. 23 to adversary proceedings in bankruptcy, and Fed. R. Bankr. P. 9032, which automatically incorporates amendments to the Federal Rules of Civil Procedure, Rule 23(f) does not apply to bankruptcy cases, according to the court of appeals.

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[2] The bankruptcy judge has not yet set a date for trial of the issue on which she allowed renewed discovery and presentation of evidence.

To reach this result, the court of appeals held that this Court lacks the power to prescribe any rule allowing appeal from a bankruptcy judge's interlocutory order. Under 28 U.S.C. § 1292(b), interlocutory appeals may be allowed only by rules this Court prescribes "in accordance with section 2072 of this title." Because § 2075 is not mentioned as well, the court of appeals found a congressional purpose to limit this Court's rule-making power over interlocutory appeals to non-bankruptcy cases only.

Thus, the court of appeals held that (1) Rule 23(f) does not apply to, or permit discretionary appeals from, class action certification orders entered by bankruptcy judges; and (2) this Court lacks the power, under 28 U.S.C. § 1292(e), to prescribe rules permitting appeal to the courts of appeals from any interlocutory order entered in a bankruptcy case.

On January 10, 2003, the court of appeals dismissed CFC's second Rule 23(f) petition for lack of jurisdiction, citing its November 19, 2002, judgment. App. 12.

REASONS FOR GRANTING THE WRIT

I. The Issues Raised By The Petition Are Important

A. Rule 23(f) Provides A Much Needed Means Of Obtaining Interlocutory Review Of Class Action Certifications In Bankruptcy And Developing Precedent For Those Cases

In recent years, a large and growing number of putative class actions have been filed as adversary

proceedings in bankruptcy cases. The Administrative Office of the Courts does not keep statistics on this class of litigation, but the spurt in published decisions in such cases alone shows it is a rapidly growing field. Corinne Ball & Michele J. Meises, *Current Trends in Consumer Class Actions in the Bankruptcy Arena*, 56 Bus. Law. 1245, 1245 (2001).

Bankruptcy class actions raise a number of particular bankruptcy-related problems as well as most of the legal issues that arise in other types of class actions. While the federal courts have struggled with the latter issues for over 35 years, bankruptcy class actions are a relatively recent development. Even the most fundamental issues particular to bankruptcy class actions remain unresolved. For example, may a bankruptcy judge certify a class that includes debtors whose bankruptcy cases are or were filed in other districts? The lower courts are split on the issue;[3] no court of appeals has yet addressed it.

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[3] Some district courts hold that a bankruptcy judge lacks jurisdiction to certify a class that includes out-of-district debtors. *See, e.g., Cline v. First Nationwide Mortgage Corp. (In re Cline)*, 282 B.R. 686, 692-95 (W.D. Wash. 2002); *Williams v. Sears, Roebuck & Co. (In re Williams)*, 244 B.R. 858, 861-68 (S.D. Ga. 2000), *aff'd*, No. 01-13285, 34 Fed.App. 967 (Table), 2002 WL 649108 (11th Cir. Mar. 25, 2002); *Knox v. Sunstar Acceptance Corp. (In re Knox)*, 237 B.R. 687, 693-94 (Bankr. N.D. Ill. 1999); *Lenior v. G.E. Capital Corp. (In re Lenior)*, 231 B.R. 662, 667-68 (Bankr. N.D. Ill. 1999); *Wiley v. Mason (In re Wiley)*, 224 B.R. 58, 64 (Bankr. N.D. Ill. 1998).

Other district courts have certified multi-district classes. *See, e.g., Kerney v. Capital One Fin. Corp. (In re Sims)*, 278 B.R. 457, 484-88 (Bankr. E.D. Tenn. 2002); *Bank United v. Manley*, 273 B.R. 229, 233-50 (N.D. Ala. 2001); *Noletto v. NationsBanc Mortgage Corp. (In re Noletto)*, 244 B.R. 845, 848-58 (Bankr. S.D. Ala. 2000); *Aiello v. Providian Fin.*

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Fed. R. Civ. P. 23(f) was adopted, in part, to permit the early development of binding precedent on just such fundamental issues.[4] It is particularly important that Rule 23(f) be permitted to fulfill that function in bankruptcy cases. Binding precedent is urgently needed on many important issues concerning class action litigation in bankruptcy.[5] Absent the avenue provided by Rule 23(f),

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Corp. (In re Aiello), 231 B.R. 693, 701-07 (Bankr. N.D. Ill. 1999), *aff'd*, 257 B.R. 245 (N.D. Ill. 2000), *aff'd*, 239 F.3d 876 (7th Cir. 2001).

See generally Ball & Meises, *supra*, at 1254-60.

[4] "[T]he rule furnishes an avenue, if the need is sufficiently acute, whereby the court of appeals can take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of the law." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000); *accord In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002), *cert. denied*, No. 02-530, 2003 WL 95368 (U.S. Jan. 13, 2003); *In re Sumitomo Copper Litig. Plaintiffs Class v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 138 (2d Cir. 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1272 (11th Cir. 2000).

[5] The class action certification orders entered in this case illustrate the need for binding precedent and appellate supervision. CFC's proposed appeal from those orders raised the still-unsettled question whether a bankruptcy judge has jurisdiction to entertain a suit on behalf of a multi-district class of debtors. *See supra* note 3. In addition, CFC's appeal raised a host of other fundamental Rule 23 concerns, such as whether the class could be certified under Rule 23(b)(2) when damages was the only relief available to most class members, *see Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000); whether the class could continue headless after the bankruptcy judge had entered judgment against the class representatives and all other debtors in their district, *see Franze v. Equitable Assurance*, 296 F.3d 1250, 1253-54 (11th Cir. 2002); whether the class was improperly defined in terms of the merits (in this case debtors who received proofs of claim that did not disclose the request for attorneys' fees with "sufficient specificity") so as to create a "fail-safe" class, *see Adashunas v. Negley*, 626 F.2d 600, 604

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precedent on those issues will develop, if at all, only rarely and fitfully.

Binding precedent on class action issues is unlikely to arise from review of final judgments in bankruptcy cases for all the same reasons it has not sufficiently developed from such review in other types of cases.[6] The comparatively short life span of most bankruptcy class action litigation and the extra level of non-precedential appellate review required under 28 U.S.C. § 158 are added obstacles preventing development of the law.

Interlocutory review under 28 U.S.C. § 158(a) provides no adequate substitute for Rule 23(f) review either. First, most courts hold that review under that section is governed by the same standards as under 28 U.S.C. § 1292(b).[7] Those standards were thought too restrictive to

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(7th Cir. 1980); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995); and whether non-common questions predominated in light of the different practices followed in different districts and in different cases, *see Henry v. Assocs. Home Equity Servs., Inc.*, 272 B.R. 266, 275-77 (C.D. Cal. 2002).

[6] "Because a large proportion of class actions settles or is resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). To illustrate, all five of the companion cases to this one have settled or been otherwise resolved. Only in this case has the class action issue remained a live, litigated issue. *See infra* p. 23.

[7] "[D]istrict courts have come to the consensus that review is proper only where the circumstances surrounding the bankruptcy court's interlocutory order are similar to those surrounding an appealable order of a district court under 28 U.S.C. § 1292(b)." *Gouveia v. IRS*, 228 B.R. 412, 413 (N.D. Ind. 1998) (footnote and citations omitted); *accord Aerovias de Mexico, S.A. de C.V. v. Feltman (In re Empresa de Transportes Aero del Peru, S.A.)*, 263 B.R. 367, 375 (S.D. Fla. 2001); *and*

(Continued on following page)

permit needed review of class action certification orders and hence were specifically not included in Rule 23(f).[8] Second, § 158(a) allows an appeal only to a district court or bankruptcy appellate panel, neither of which can create binding precedent.[9] Absent certification under § 1292(b), review is stopped at that point by § 158(d), which allows

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see Travers v. Dragul (In re Travers), 202 B.R. 624, 626 (B.A.P. 9th Cir. 1996) (using language of § 1292(b) as standard for granting review under § 158(a)). Ignoring these cases and citing no contrary authority, the court of appeals wrote, "the § 1292(b) requirements need not be satisfied when an interlocutory appeal is taken from the bankruptcy court to the district court. . . . Thus, an appellate avenue to the district court free of the constraints of § 1292(b) already exists for a bankruptcy judge's class certification order." App. 9; 312 F.3d at 1245-46. The above-cited cases prove this proposition untrue, as do the district court's orders in this case, which denied CFC leave to appeal under § 158(a) for failure to satisfy § 1292(b) standards. App. 15, 17-18, 20.

[8] The Advisory Committee Note to Rule 23(f) specifically observes that the new rule "does not include the potentially limiting requirements of § 1292(b) . . . ." Fed. R. Civ. P. 23(f) advisory committee's note on 1998 amendment, ¶ 1 (Supp. 2002). Those "limiting requirements" have made review of class action certification orders under § 1292(b) rare. *See* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531, 1550-51, 1556-57 (2000).

[9] *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (district court opinions not binding); *In re Raphael*, 238 B.R. 69, 77 (D. N.J. 1999) (same); *City of Olathe, Kansas v. KAR Dev. Assocs., L.P. (In re KAR Dev. Assocs., L.P.)*, 180 B.R. 629, 640 (D. Kan. 1995) (same); *In re Mays*, 256 B.R. 555, 559 (Bankr. D. N.J. 2000) (same); *In re Zimmer*, 313 F.3d 1220, 1225 n.3 (9th Cir. 2002) (noting unresolved intra-circuit split on whether B.A.P. decisions are binding); *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990) (same); *AARP v. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.)*, 269 B.R. 428, 434 (C.D. Cal. 2001) (B.A.P. decision not binding); *Daly v. Deptula (In re Carrozzella & Richardson)*, 255 B.R. 267, 272-73 (Bankr. D. Conn. 2000) (same).

appeal to the courts of appeals from final judgments only. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 252, 112 S.Ct. 1146, 1148-49, 117 L.Ed.2d 391 (1992).

Review under Rule 23(f) is the only effective means to bring order and binding precedent to the increasingly active field of class action litigation in bankruptcy. The court of appeals' decision in this case chokes off that avenue of review, thereby stifling the one effective means of bringing order to an important type of federal litigation. Certiorari should be granted to open this needed means of appellate review.

B. This Court's Power To Promulgate Any Rules Governing Appeals In Bankruptcy Cases Is Nullified By The Decision Below

As the Court of last resort in the federal system, this Court has a special responsibility to exercise supervisory authority over questions of practice and procedure in the federal courts.[10] That responsibility is heightened when the question addresses this Court's own power to promulgate rules governing procedure in the federal courts.[11] This petition raises such an issue.

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[10] *Florida v. Rodriguez*, 469 U.S. 1, 7, 105 S.Ct. 308, 311, 83 L.Ed.2d 165 (1984) (Stevens, J., dissenting); *McNabb v. United States*, 318 U.S. 332, 340-41, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1943).

[11] *Schlagenhauf v. Holder*, 379 U.S. 104, 112, 85 S.Ct. 234, 239, 13 L.Ed.2d 152 (1964); *and see Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107, 88 S.Ct. 733, 736, 19 L.Ed.2d 936 (1968).

Here, the court of appeals held that Congress denied this Court the power to prescribe rules permitting appeal of interlocutory decisions to the courts of appeals in bankruptcy cases. That holding has importance far beyond the confines of this case or the issue of interlocutory appeals of class action certification orders in bankruptcy cases.

Congress passed § 1292(e) in response to the recommendations of the Federal Courts Study Committee's 1990 report. It saw § 1292(e) as a means of allowing the Court to clarify, by court rule, the principles governing appealability of lower federal court decisions – allowing interlocutory review where awaiting final review would create injustice or be undesirable for other reasons, while preserving the final judgment rule from erosion by exceptions that blur its edges and generate purely procedural litigation.[12]

Bankruptcy cases have long been recognized as prime examples of the type of litigation in which the final judgment rule produces untoward results, if strictly enforced. The lower federal courts have worked around that problem by according "practical" finality to a variety of different types of bankruptcy court orders that do not bring the entire bankruptcy proceeding to a close.[13] Practical finality is often in the eye of the beholder, however, leading to

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[12] S. Rep. No. 102-342, at 24 (1992); Fed. Courts Study Comm. Rep. at 95 (1990).

[13] *See, e.g.*, *North Slope Borough v. Barstow (In re MarkAir, Inc.)*, 308 F.3d 1057, 1060 (9th Cir. 2002); *Prof'l Ins. Mgmt. v. Ohio Cas. Group of Ins. Cos. (In re Prof'l Ins. Mgmt.)*, 285 F.3d 268, 279-82 (3d Cir. 2002); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 282-84 (5th Cir. 2000).

confusion, loss of appellate rights, and the other types of evils that § 1292(e) was enacted to combat.[14]

So far this Court has been cautious in exercising the power conferred by that section. But bankruptcy cases beckon as a prime field for further clarification of appellate rights by adoption of rules under § 1292(e) if the Court's first experiment under that section, Rule 23(f) as incorporated in Bankruptcy Rule 7023, proves a success.

The court of appeals' decision in this case is an obstacle to any effort by this Court to bring order to the important field of appeals in bankruptcy cases through its rule-making power. The decision holds that Congress denied this Court the power to adopt such rules with respect to this one class of federal litigation in which those rules are most needed. The holding extends far beyond the immediate question of Rule 23(f)'s scope. It will impede any future effort by this Court to adopt a rule governing appeal from any other type of interlocutory order in a bankruptcy case as well.

Many years of work, a wide-ranging study of the federal court system, and two pieces of federal legislation were needed to grant this Court the power to make rules governing appealability. Congress is unlikely to devote such effort to the problem again in the foreseeable future. Certiorari should be granted to reaffirm this Court's power, under existing legislation, to promulgate rules

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[14] Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717, 745-46 (1993).

governing interlocutory appeals in bankruptcy cases, an increasingly important area of federal litigation.

II. The Court Of Appeals' Decision Is Erroneous

Had Congress intended to deny this Court the power to prescribe rules allowing appeals of interlocutory orders in bankruptcy cases, it could easily have said so in clear, unmistakable language.[15] That language is notably missing from § 1292(e).

The House and Senate reports on the bill that enacted that provision are also silent with respect to any congressional intent to limit the Court's rule-making authority to particular types of federal litigation and not others.[16] The Federal Courts Study Committee report, which was the genesis of this section, likewise says nothing about authorizing rules to govern interlocutory appeals in non-bankruptcy cases only.

Ignoring this silence, the court of appeals' decision discerns in a single, seemingly innocuous statutory phrase a congressional intent to cabin the Court's rule-making authority. The phrase, which directs that rules governing interlocutory appeals shall be prescribed "in accordance

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[15] Had that been Congress' intent, § 1292(e) might have read: "The Supreme Court may prescribe rules in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision *other than in a case under title 11* to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)." Alternatively, Congress might have added a sentence to the existing language, stating: "No rule so prescribed shall apply to a case under title 11."

[16] *See* S. Rep. No. 102-342, at 16-18, 24 (1992); H.R. Rep. No. 102-1006, at 14, 18 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3923, 3927.

with section 2072 of this title," makes no apparent distinction between bankruptcy cases and other types of federal litigation.

To draw that distinction, the court of appeals first had to posit an unbreachable line of demarcation between rules adopted under 28 U.S.C. § 2072 and those adopted under § 2075: "If we construe § 2072 to authorize prescription of rules for bankruptcy proceedings, we render § 2075 superfluous . . . ." 312 F.3d at 1245. Based on that premise, the court of appeals reasoned that any rule adopted "in accordance with § 2072" could not apply to bankruptcy cases. Hence, the court of appeals held, by empowering this Court to adopt rules "in accordance with § 2072" to provide for interlocutory appeals, Congress limited the Court's rule-making authority to non-bankruptcy cases.

There are several flaws in this reasoning. First, it is too convoluted a line of deduction. The court of appeals suggests no reason why Congress would have resorted to such indirection when it could easily have adopted direct and clear language to prohibit rules for interlocutory appeals in bankruptcy cases, if it intended to so limit the power it conferred on this Court.[17]

Second, the court of appeals suggested no reason why Congress would have denied this Court the power to prescribe rules for interlocutory appeals in this one class

[17] "[M]isimpressions are created by the reader . . . who takes a [snippet] from an opinion [or statute], sometimes out of context, and analyzes it as a Shakespeare scholar would, or as though it were a verse from Holy Writ, discovering hidden meanings, innuendoes, and subtleties never intended." Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810, 817 (1961).

of federal litigation only. There is no indication of any reason for such a rule in § 1292(e)'s legislative history or the Federal Courts Study Committee report that preceded it. If anything, as already mentioned, the problems with the final judgment rule are more acute in bankruptcy cases, warranting freer allowance of interlocutory appeals in those cases, not the more restrictive approach that the court of appeals' opinion posits.

Third, the court of appeals' premise is incorrect. There is no unbreachable line between § 2072 and § 2075. Rules prescribed under § 2072 may and do apply in bankruptcy cases. The Federal Rules of Appellate Procedure, for example, govern appeals to the courts of appeals in bankruptcy cases.[18] The Federal Rules of Evidence apply in bankruptcy cases as well, despite the fact that § 2075, unlike § 2072, does not expressly mention "rules of evidence."[19]

Fourth, contrary to the court of appeals' reasoning, § 2075 has meaning even if rules adopted under § 2072 apply to bankruptcy cases. Section 2075 has a separate

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[18] Although the Court's original order adopting the Federal Rules of Appellate Procedure invoked the Court's authority under both § 2072 and § 2075, all orders adopting amendments to those rules after 1980 have mentioned only § 2072. For example, when this Court adopted Fed. R. App. P. 6 in 1989, governing appeals in bankruptcy cases, and later amended that rule in 1993, its orders referenced only § 2072, not § 2075. Yet it is the current rules, and particularly Rule 6, not the rules in effect 20 years ago, that now govern procedure in the courts of appeals in bankruptcy cases.

[19] The order initially adopting the Federal Rules of Evidence did invoke both § 2072 and § 2075, but all subsequent orders promulgating amendments to those rules have mentioned § 2072 or former § 2076 only.

historical origin in section 30 of the Bankruptcy Act of 1938 and was adopted in its present form in 1964, upon the Judicial Conference's recommendation that "rulemaking in bankruptcy should conform to the pattern prescribed for rulemaking in the areas of civil procedure . . . ," particularly with respect to reporting new rules to Congress and to superseding conflicting laws once the congressional waiting period has expired.[20]

While there is some overlap between § 2072 and § 2075, the two also separate their realms of operation even within the bankruptcy arena. Section 2072 authorizes rules of evidence and rules of practice and procedure for the courts of appeals; § 2075 does not. Conversely, § 2075 authorizes general rules governing cases under title 11, encompassing a broad range of topics peculiar to bankruptcy cases, such as commencement of a bankruptcy case, notice to creditors, appointment of trustees and creditors' committees, filing of claims, claims administration, collection and liquidation of the estate, approval of bankruptcy plans, and discharge of the debtor, as well as "the forms of process, writs, pleadings, and motions," all of which are neither appropriate for nor addressed by rules adopted under § 2072.

Thus, just as with the statutes this Court reconciled in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992), § 2072 and § 2075 do not pose an either-or proposition. While they have substantial areas of overlap, they also have separate

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[20] S. Rep. No. 1561 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3804, 3805.

realms of operation. There is no "positive repugnancy" between the two, and so they can both be given effect without drawing the artificial distinction between them that the court of appeals thought necessary.

Because rules adopted under § 2072 may apply in bankruptcy cases, Congress did not deny this Court the power to prescribe rules for interlocutory appeals in bankruptcy cases when it provided in § 1292(e) that rules for such appeals should be prescribed "in accordance with § 2072."

Furthermore, in adopting Rule 23(f), this Court exercised the full power accorded it under § 1292(e). Nothing in the text of Rule 23(f) states it does not apply to bankruptcy cases, nor did the Court adopt a bankruptcy rule so stating. By operation of Bankruptcy Rule 9032, Rule 23(f) was therefore automatically made applicable to bankruptcy cases by Bankruptcy Rule 7023.

Neither of the court of appeals' objections to this literal application of the rules has merit. The supposed linguistic absurdity produced by a mechanical substitution of bankruptcy terms for words in Rule 23(f) is easily avoided. App. 5 n.3. Bankruptcy Rule 9002 provides that terms are to be substituted in accordance with its provisions "unless they are inconsistent with the context."

That § 158(a) already allows discretionary appeals of interlocutory decisions in bankruptcy cases is no obstacle either. App. 10. It is no different from § 1292(b), which permits discretionary interlocutory appeals in non-bankruptcy cases. The same restrictive standards are applied under both, allowing appeals of class action certification orders only rarely. For that reason, the risk of simultaneous appeals of the same order under both

§ 158(a) and Rule 23(f) is more theoretical than real. The lower courts can easily avoid any conflict in appellate jurisdiction, if a party requests review of a class action certification order by both means. One court can simply deny review if another court has granted it.

The court of appeals' contrary conclusion is incorrect and should be reversed to assure that Rule 23(f) and all later invocations of this Court's authority under § 1292(e) are given their proper, intended scope.

III. Certiorari Should Be Granted Now

Certiorari should be granted now to resolve the important issues raised by this petition, to correct the court of appeals' error, and to vindicate and clarify this Court's rule-making authority.

This Court is the final arbiter of its own rule-making powers. It need not and should not await a split in the circuits before acting to avoid the court of appeals' unwarranted restriction of this Court's powers. Otherwise, this Court's powers remain hostage to views of the lower federal courts, which by their agreement could stifle this Court's efforts to prescribe uniform rules of procedure for all federal courts and cases.

The court of appeals' erroneous holding creates a particularly troubling dis-uniformity because bankruptcy cases are not handled by a separate court, but rather by the federal district courts, of which the bankruptcy judges are a unit handling those bankruptcy cases that district judges choose to refer to them. 28 U.S.C. §§ 151, 157. But not all bankruptcy cases are referred to bankruptcy judges. District judges hear some of them.

If a district judge enters a class action certification order in one of those retained bankruptcy cases, may the aggrieved party seek immediate review under Rule 23(f)? If not, Rule 23(f) does not apply uniformly to all district court cases. If so, the availability of interlocutory appellate review turns on a technicality bearing no relation to any conceivable congressional purpose, namely on whether the district court has chosen to refer the case to a bankruptcy judge.

Waiting until a conflict arises among decisions of the courts of appeals on the issues presented by this petition would thwart the purposes for which § 1292(e) was enacted and Rule 23(f) adopted. The statute was enacted to allow this Court to bring greater certainty to questions of appealability and to facilitate interlocutory appeals where the final judgment rule produces untoward results. As long as the court of appeals' erroneous decision remains, there will be more, not less, uncertainty regarding what orders may be appealed, and parties will be prevented from obtaining interlocutory review in the one arena in which this Court has thus far found relief from the final judgment rule appropriate.

Furthermore, as this case and its companions illustrate, there is at least as much need for interlocutory review of class action certification orders and other interlocutory orders in bankruptcy cases as there is in other classes of litigation. Rule 23(f) was adopted, in part, to allow review of important legal issues that might otherwise evade review in the courts of appeals and this Court, because class certification may create a risk of potentially ruinous liability that forces settlement or because cases otherwise resolve in ways that preclude review of the class action determination. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

Exactly that has happened here. Of the six adversary proceedings in the Southern District of Alabama from which similar Rule 23(f) petitions were filed in the court of appeals, only this one still survives. All the rest have settled or had final judgment entered. This one remains open only because of a highly unusual circumstance – the granting of a motion to alter or amend judgment, leading to a reopening of discovery and presentation of evidence after conclusion of the first trial.

As these facts illustrate, it may be only by the rarest of chances that the Court will again have the opportunity to vindicate its own rule-making powers, reversing the court of appeals' erroneous and detrimental restriction of them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 14, 2003

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312 F.3d 1241

United States Court of Appeals,
Eleventh Circuit.

CHRYSLER FINANCIAL CORPORATION,
Petitioner,
v.
Michael F. POWE, Theresa Moore Ballard,
Respondents.
First Union Mortgage Corporation,
Petitioner,
v.
Betty Ann Dean,
Respondent.
PNC Mortgage Corp. of America,
Petitioner,
v.
Reth Allen Smith, Sherry Ryland Smith,
Respondents.

Nos. 01-90036-D 01-90039-B and 01-90060-C.

Nov. 19, 2002.

Jan T. Chilton, Severson & Werson, San Francisco, CA, C. Lee Reeves, Sirote & Permott, [sic] P.C., Birmingham, AL, for Chrysler Financial Corp.

Steven L. Nicholas, Olen & Nicholas, P.C., Olen, Nicholas Copeland, Mobile, AL, Donald J. Stewart, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, AL, for Respondents.

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Thomas M. Hefferon, Goodwin, Proctor & Hoar, Washington, DC, for FNC Mortgage Corp. of America.

On Petitions for Permission to Appeal from Orders of the United States Bankruptcy Court for the Southern District of Alabama.

Before BIRCH and COX, Circuit Judges, and GEORGE,* Senior District Judge.

GEORGE, Senior District Judge:

Petitioners Chrysler Financial Corporation, First Union Mortgage Corporation, and PNC Mortgage Corporation of America are separately defendants in adversarial proceedings before a bankruptcy judge in which plaintiffs allege that petitioners violated the bankruptcy code by claiming and collecting attorneys' fees from them and other debtors. In each case, the bankruptcy judge granted class certification, and petitioners filed under Fed.R.Civ.P. 23(f) and Fed. R. Bankr.P. 7023(f) for review by this Court of those class certification orders. This Court raised *sua sponte* and directed briefing and argument on the common jurisdictional issue of whether a party may petition this Court to directly review a bankruptcy judge's order granting class certification. This is an issue of first impression.

I. *Statutory and Rules Framework*

Fed.R.Civ.P. 23 governs the procedure for class actions in the United States district courts. *See* Fed.R.Civ.P. 1; Fed.R.Civ.P. 23. Furthermore, the Federal Rules of Civil Procedure apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy

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* Honorable Lloyd D. George, Senior U.S. District Judge for the District of Nevada, sitting by designation.

Procedure. Fed.R.Civ.P. 81(a)(1).[1] In 1983, the Supreme Court prescribed, pursuant to 28 U.S.C. § 2075, the Bankruptcy Rules governing the practice and procedure in cases under Title 11, and those rules took effect on August 1, 1983. Fed. R. Bankr.P. 9032 provides:

> The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules.[2]

Effective December 1, 1998, Rule 23(f) was added to Fed.R.Civ.P. 23:

> (f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An

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[1] Prior to the 2001 amendments, Fed.R.Civ.P. 81(a)(1) provided that the Civil Rules "do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." The 2001 amendments restyled the reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure. Fed.R.Civ.P. 81 advisory committee's notes, 2001 amendments. This change has no effect on our jurisdictional analysis.

[2] The 1991 amendment to Fed. R. Bankr.P. 9032 added the final four words "or by these rules," in order "to provide flexibility so that the Bankruptcy Rules may provide that subsequent amendments to a Federal Rule of Civil Procedure made applicable by these rules are not effective with regard to Bankruptcy Code cases or proceedings." Fed. R. Bankr.P. 9032 advisory committee's note, 1991 amendment.

> appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The advisory committee's note to Rule 23(f) confirms that "[t]his permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e)." Fed.R.Civ.P. 23 advisory committee's note, 1998 amendments. Section 1292(e) reads:

> (e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d) [governing procedure and jurisdiction over interlocutory appeals from the district court].

Section 2072 confers on the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the Unites [sic] States district courts (including proceedings before magistrates thereof) and courts of appeals." 28 U.S.C. § 2072(a).

Section 2075 – the provision pursuant to which the Supreme Court prescribed the Bankruptcy Rules in 1983 – reads in pertinent part, "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11." 28 U.S.C. § 2075.

II. *Authority to Incorporate Rule 23(f) into the Bankruptcy Rules*

Petitioners urge that under Fed. R. Bankr.P. 9032, Fed.R.Civ.P. 23(f) was automatically incorporated into Fed. R. Bankr.P. 7023 upon Rule 23(f)'s adoption. When

the Federal Rules of Civil Procedure are made applicable to cases under the Bankruptcy Code, Bankruptcy Rule 9002 provides that certain phrases take on different meanings unless they are inconsistent with the context. "District court," "trial court," "court," "district judge," or "judge" means "bankruptcy judge" if the case or proceeding is pending before a bankruptcy judge. Fed. R. Bankr.P. 9002(4). According to this substitution, petitioners argue that Bankruptcy Rule 7023(f) should be read:

> A court of appeals may in its discretion permit an appeal from an order of a *bankruptcy judge* granting or denying class action certification under this rule if application is made to it within ten days after the entry of the order. An appeal does not stay proceedings in the *bankruptcy court* unless the *bankruptcy judge* or the court of appeals so orders.[3]

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[3] As respondents point out, a strict substitution of terms pursuant to Rule 9002(4) fairs [sic] poorly with Rule 23(f). Their argument is based in part on Fed. R. Bank. P. 9002(2), which states that "appeal" means "an appeal as provided by 28 USC § 158." The resulting Rule 7023(f) would read:

> The court of appeals may in its discretion permit *an appeal as provided by 28 USC § 158* from an order of a *bankruptcy judge* granting or denying class action certification under this rule if application is made to it within ten days after the entry of the order. An appeal does not stay proceedings in the *bankruptcy judge* unless the *bankruptcy judge* or the court of appeals so orders.

There is no dispute that § 158 provides for direct appeals of bankruptcy orders to the district court or to a bankruptcy appellate panel, not directly to the court of appeals. However, Rule 9002 does not permit the substitution of terms if "they are inconsistent with the context." Fed. R. Bankr.P. 9002. Therefore, setting aside the awkwardness of the wording of the last sentence, the rule may be read harmoniously if the substitution is not made for the word "appeal."

Petitioners also argue that Bankruptcy Rule 7023(f)'s authorization of discretionary interlocutory appeals to the courts of appeals from class certification orders entered by bankruptcy court judges is consistent with Rule 23(f)'s purposes.

Respondents dispute this court's authority to directly review class certification orders entered by bankruptcy judges on grounds of jurisdiction and implementation. The question calls on us first to determine whether authority exists to apply Rule 23(f) to the Bankruptcy Rules.

The advisory committee's note to Rule 23(f) recognizes that the permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Fed.R.Civ.P. 23 advisory committee's note, 1998 amendments. Section 1292(e) empowers the Supreme Court to prescribe rules "in accordance with section 2072" to provide for interlocutory appeals to the court of appeals not otherwise provided for in the previous subsections of § 1292. 28 U.S.C. § 1292(e). Section 2072 authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the district courts (including proceedings before magistrates thereof) and courts of appeals. 28 U.S.C. § 2072.

Section 2075 expressly authorizes the Supreme Court to prescribe bankruptcy rules; § 2072 does not. Petitioners argue, however, that this difference does not suggest that Congress intended to limit the Supreme Court's rulemaking authority under §§ 1292(e) and 2072 to non-bankruptcy cases. According to petitioners, the language of § 1292(e) authorizing the Supreme Court to prescribe rules "in accordance with section 2072" incorporates § 2072's procedural requirements for adoption of rules of court, but

not its substantive, and therefore, jurisdictional, limits. The wording of § 1292(e), however, does not suggest any such procedural/substantive distinction, and petitioners have presented no authority to support it. Indeed, it is not § 2072, but § 2074, that governs the procedure for the Supreme Court's submission of § 2072 – prescribed rules to Congress. Section 1292(e) makes no mention of § 2074. Therefore, petitioners' argument that § 1292(e) institutes only the procedural requirements for adoption of rules of court must fail.

Petitioners also submit that because § 2072 does not itself authorize the Supreme Court to adopt rules allowing appeals from non-final orders, § 1292(e)'s reference to § 2072 cannot be read to preclude application to bankruptcy cases. However, as § 2072 grants the Supreme Court substantive powers to prescribe rules for district courts and courts of appeals, its constraint upon authorizing the prescription of rules for interlocutory appeals under § 1292(e) must be read to apply to the same extent, or mean nothing at all.

Our characterization of the substantive import of § 1292(e)'s incorporation of § 2072 leads us to the central weakness in petitioners' argument that we have jurisdiction over the bankruptcy judge's class certification pursuant to Rule 23(f): If we construe § 2072 to authorize the prescription of rules for bankruptcy proceedings, we render § 2075 superfluous – an act inconsistent with the canons of statutory construction. *See Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan,* 221 F.3d 1235, 1246 (11th Cir.2000) (statutes should not be construed to

render certain provisions superfluous or insignificant), *cert. denied,* 532 U.S. 967, 121 S.Ct. 1504, 149 L.Ed.2d 388 (2001).[4]

This is not a case of partially overlapping reaches of jurisdictional statutes as was encountered in *Connecticut National Bank v. Germain,* 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). In that case, the Supreme Court held that "giving effect to both §§ 1291 and 158(d) would not render one or the other *wholly* superfluous." *Id.* at 253 (emphasis added). A reading of § 2072 to grant authority to prescribe bankruptcy rules would make the entirety of § 2075 irrelevant.[5]

We also conclude that this construction would not deny efficacy to the purposes behind Rule 23(f). Rule 23(f) makes available an avenue of permissive appeal from a district court's class certification order in order to avoid the § 1292(b) requirements that "the district court certify the certification ruling for appeal," or that the district court find that the matter "involve[s] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* Fed.R.Civ.P. 23(f) advisory

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[4] Petitioners argue that, by the same token, this construction writes Rule 23(f) out of the Bankruptcy Rules. The difference, however, is that pursuant to our analysis of the operation of §§ 1292(e) and 2072, Rule 23(f) was never written into the Bankruptcy Rules.

[5] This would include not only the prescriptive first paragraph of § 2075, but also the paragraph that proscribes the abridgement, enlargement, or modification of any substantive right, and the paragraph governing transmittal procedure. Those latter paragraphs each expressly and exclusively apply to rules prescribed under § 2075.

committee's note, 1998 amendments. However, the § 1292(b) requirements need not be satisfied when an interlocutory appeal is taken from the bankruptcy court to the district court. In such a case, the district court's discretion to entertain an interlocutory appeal from the bankruptcy court is analogous to the court of appeals' discretion to entertain a Rule 23(f) appeal from the district court. *See* 28 U.S.C. § 158(a). Thus, an appellate avenue to the district court free of the constraints of § 1292(b) already exists for a bankruptcy judge's class certification order. Nothing in Rule 23(f) suggests that a bankruptcy appeal to the district court would be inadequate, or that an appeal to the court of appeals should trump district court appellate jurisdiction over bankruptcy cases. In sum, the appellate avenue addressed by Rule 23(f) is already available to petitioners through an interlocutory appeal to the district court.[6]

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[6] The Eleventh Circuit, in an unpublished opinion, previously foreclosed an appeal of a district court's ruling on a bankruptcy judge's class certification order on the ground that the orders were not final or otherwise immediately appealable as of right. *See Homeside Lending, Inc. v. Sheffield,* No. 01-90031-B (11th Cir. Nov. 27, 2001) (citing 28 U.S.C. § 158); *cf. In re El Paso Elec. Co.,* 77 F.3d 793, 794 (5th Cir.1996) (upon certification, the court of appeals may hear appeals of interlocutory orders issued by the district court sitting as appellate court in bankruptcy matters) (citing *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). This does not change our conclusion, however. Again, the advisory committee's note to Rule 23(f) indicates that the Rule was intended to provide an appellate avenue free of the limitations of § 1292(b); nothing in Rule 23(f)'s terms or the advisory committee's notes suggest that the Rule allows a permissive appeal from all class certification orders to the court of appeals, including those issued by a bankruptcy judge.

Furthermore, if Rule 23(f) were applied to class certification orders in bankruptcy, litigants could appeal such orders simultaneously to the district court pursuant to 28 U.S.C. § 158(a) and to the court of appeals pursuant to Bankruptcy Rule 7023(f). That scenario, needless to say, is fraught with uncertainty.[7] Therefore, we also find practical value in recognizing that §§ 1292(e) and 2072 do not permit incorporation of Rule 23(f) into the Bankruptcy Rules.

Another consideration runs contrary to petitioners' contention that § 1292(e) authorizes the Supreme Court to prescribe rules providing for discretionary appeals to this court of a bankruptcy judge's class certification determination. While not discussed by the parties, we note that the Supreme Court relied upon § 2075 as the jurisdictional basis for its orders prescribing Bankruptcy Rules and amendments. In its order of April 25, 1983, the Supreme Court expressly drew upon § 2075 for authority to prescribe the new Bankruptcy Rules. That Order also separately invokes § 2075 for authority to transmit the rules to Congress. Moreover, while the orders of the Supreme Court amending the Bankruptcy Rules do not specifically identify § 2075 as authority for prescribing the changes, the Supreme Court identifies § 2075 as authority to transmit the amendments to Congress. Therefore, given that the Supreme Court did not expressly identify § 2074,

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[7] For instance, there would be confusion regarding the status of the district court's jurisdiction over an appeal of a bankruptcy judge's class certification order if and when the court of appeals exercises Rule 7023(f) jurisdiction, and, if the district court retains such jurisdiction, the risk of inconsistent determinations.

which authorizes transmittal of rules prescribed under § 2072, as joint authority with § 2075 for its transmittal of the amendments, there is no reason to think that the Supreme Court relied upon § 2072, even tacitly, as authority for prescribing the amendments.

III. *Conclusion*

We conclude that Rule 23(f)'s application is limited by § 1292(e) to rules prescribed "in accordance with section 2072," which empowers the Supreme Court to prescribe rules in the United States district courts and courts of appeals. We further find that reading § 1292(e) and § 2072 to govern bankruptcy rulemaking would render the specific bankruptcy rulemaking provisions of § 2075 wholly superfluous and irrelevant. The Supreme Court has never identified § 2072 as its rulemaking authority when prescribing rules for practice and procedure in bankruptcy, and we decline to recognize that basis for jurisdiction here.[8]

The instant petitions for permission to appeal pursuant to Fed.R.Civ.P. 23(f) from class certification orders of the United States Bankruptcy Court for the Southern District of Alabama are therefore DISMISSED.

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[8] Our holding that there is no statutory authority under §§ 1292(e) and 2072 for the incorporation of Rule 23(f) into the Bankruptcy Rules makes it unnecessary for us to resolve whether such an incorporation would improperly expand the jurisdiction of the court of appeals. Nor need we address the timeliness or mootness issues of Chrysler Financial Corporation's and First Union Mortgage Corporation's petitions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-90035-D

CHRYSLER FINANCIAL
CORPORATION, L.L.C.,

Petitioner,

versus

MICHAEL F. POWE,
THERESA MOORE BALLARD,

Respondents.

On Petition for Permission to Appeal
an Order of the Bankruptcy Court

(Filed Jan. 10, 2003)

BEFORE: CARNES, HULL and WILSON, Circuit Judges.

BY THE COURT:

This petition is DISMISSED for lack of jurisdiction. *See Chrysler Financial Corp. v. Powe*, No. 01-90036, 2002 WL 31567145 (11th Cir. Nov. 19, 2002).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

IN RE: MICHAEL F. POWE, Debtor, MICHAEL F. POWE, Plaintiff,. v. CHRYSLER FINANCIAL CORPORATION, Defendant.	)	(Bankruptcy Case No. 98-10935-MAM-7) (Chapter 13) CIVIL ACTION NO. 02-0709-BH-L (Adversary No. 99-1121)

ORDER

(Filed Sep. 26, 2002)

This action is before this Court pursuant to a Notice of Appeal filed by Chrysler Financial Corporation, now known as DaimlerChrysler Services North America LLC (hereinafter "CFC"), a defendant in the above-referenced Adversary Proceeding. CFC seeks to appeal once again from two interlocutory orders entered by the Bankruptcy Court on August 23, 2002, the first denied CFC's motion to determine that the named plaintiff's have no standing to represent the class (Bankr. Doc. 213), and the second denied CFC's motion to reconsider and amended the Bankruptcy Court's Order of July 3, 2002 by re-certifying the class (Bankr. Doc. 214). This appeal (Doc. 1) was transmitted on September 20, 2002.

On September 24, 2002, CFC filed a motion (Doc. 2) for oral arguments on its motion for leave to appeal the

aforementioned Orders of August 23, 2002. The subject motion for leave to appeal was filed in the Bankruptcy Court on August 30, 2002 (Bankr.Doc. 217) and denied by the Bankruptcy Court on September 3, 2002 (Bankr. Doc. 219). No specific motion for leave to appeal has been filed in this Court, only the aforementioned motion for oral arguments.

It is nonetheless apparent that CFC seeks for the fifth time (the fourth time by appeal) to remove this case from the Bankruptcy Court's jurisdiction. The first attempt was by a motion to withdraw reference which was denied by this Court on February 28, 2000. The first motion to appeal sought to appeal an interlocutory order denying CFC's motion to dismiss the debtor/plaintiff's class claims for lack of jurisdiction. CFC's first motion for leave to appeal was denied on May 1, 2000. *See, In re Powe*, Civil Action No. 00-0283-BH-L. The second sought to appeal an interlocutory order entered on June 1, 2001, granting debtor's motion for class certification. CFC's second motion was denied on July 11, 2001. *See, In re Powe*, Civil Action No. 01-0449-BH-M. The third motion sought to appeal an interlocutory order entered by the Bankruptcy Court on July 27, 2001, in which the court defined the class previously certified in the case under Rule 23(b)(2). CFC's third motion to appeal was denied on August 27, 2002. *See, In re Powe*, Civil Action No. 01-0600-BH-M.

This Court has again taken CFC's motion for leave to appeal (Bankr. Doc. 217) under submission and considered same together with the record as a whole, including the Bankruptcy Court's Order of September 3, 2002, denying CFC's request for leave to appeal (Bankr. Doc. 219) and Powe's response in opposition to appeal already filed in the Bankruptcy Court (Bankr. Doc. 222). The Court finds it

unnecessary to require any further argument. The Court concludes, *inter alia* for the reasons stated by Powe in his opposition brief, that CFC's motion is due to be denied. The Court specifically concludes, as was true with respect to CFC's first three attempts to appeal, that the issues sought to be presented on this appeal do not involve "a controlling question of law as to which there is **substantial** ground for difference of opinion . . . **an immediate [resolution of which] may materially advance the ultimate termination of the litigation.**" 28 U.S.C. § 1292(b) (emphasis added). The Court once again finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that the rulings at issue could escape effective review on appeal after a final judgment.

It is therefore **ORDERED** that CFC's present motion for oral arguments and leave to appeal be and is hereby **DENIED** and that this action be once again returned to the Bankruptcy Court forthwith.

DONE this 26th day of September, 2002.

/s/ W. B. Hand
SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

IN RE:

MICHAEL F. POWE, Debtor, MICHAEL F. POWE, Plaintiff, v. CHRYSLER FINANCIAL CORPORATION, Defendant	)	(Bankruptcy Case No. 98-10935-MAM-7) (Chapter 13) CIVIL ACTION NO. 01-0600-BH-M (Adversary No. 99-1121)

ORDER

(Filed Aug. 27, 2001)

This action is before this Court on a motion filed by defendant Chrysler Financial Corporation ("CFC") for leave to appeal under 28 U.S.C. § 158(a) from an interlocutory order entered by the Bankruptcy Court on July 27, 2001, in which the court defined the class previously certified in the case under Rule 23(b)(2).[1] CFC challenges,

[1] This is the third appeal and fourth attempt by CFC to remove this case from the Bankruptcy Court's jurisdiction. The first attempt was by a motion to withdraw reference which was denied by this Court on February 28, 2000. The first motion to appeal sought to appeal an interlocutory order denying CFC's motion to dismiss the debtor/plaintiff's class claims for lack of jurisdiction. CFC's first motion for leave to appeal was denied on May 1, 2000. *See In re Powe,* Civil Action No. 00-0283-BH-L. The second sought to appeal an interlocutory order entered on June 1, 2001, granting debtor's motion for class

(Continued on following page)

on essentially the same grounds it has asserted in each of the prior attempts to appeal, the Bankruptcy Court's certification of a nationwide class even though the Order defining the class contained the following caveat:

> The Court is not narrowing the definition at this point. **If a narrower definition is proved to be appropriate after trial, then the Court will so rule. . . . If trial proof shows that certain states or districts should be excluded from some or all claims, that amendment will be made after trial.**

July 27, 2001 Class Issues Order (emphasis added.)[2] CFC also seeks to have this Court stay all proceedings and activities in the Bankruptcy Court in this case, principally to delay trial preparation, until this Court reviews the class certification Order of July 27, 2001, the subject of this interlocutory appeal.

The Court has, however, already taken CFC's motion for leave to appeal (Bank. Doc. 139) under submission and considered same together with the record as a whole, including Powe's response in opposition to appeal already filed in the Bankruptcy Court (Doc. 140). The Court finds it unnecessary to require any further argument. The Court concludes that CFC's motion is due to be denied. The Court specifically concludes, as was true with respect to CFC's first attempts to appeal, that the issues sought to be

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certification. CFC's second motion was denied on July 11, 2001. *See, In re Powe*, Civil Action No. 01-0449-BH-M.

[2] On August 2, 2001, CFC filed a motion in the Bankruptcy Court to clarify that court's June 1, 2001, Order on summary judgment. This motion to clarify remains pending.

presented on this appeal do not involve "a controlling question of law as to which there is **substantial** ground for difference of opinion . . . **an immediate [resolution of which] may materially advance the ultimate termination of the litigation.**" 28 U.S.C. {s}1292(b) (emphasis added). The Court once again finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that the rulings at issue could escape effective review on appeal after a final judgment.

It is therefore **ORDERED** that CFC's present motion for leave to appeal and for a stay be and his hereby **DENIED** and that this action be once again returned to the Bankruptcy Court forthwith.

DONE this 27th day of August, 2001.

/s/ W B Hand
SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

IN RE:

MICHAEL F. POWE, Debtor,	)	(Bankruptcy Case No. 98-10935-MAM-7) (Chapter 13)
MICHAEL F. POWE, Plaintiff,	)	CIVIL ACTION NO. 01-0449-BH-M
v.	)	(Adversary No. 99-1121)
CHRYSLER FINANCIAL CORPORATION, Defendant	)	

ORDER

(Filed Jul. 11, 2001)

This action is before this Court on motion filed by defendant Chrysler Financial Corporation ("CFC") for leave to appeal under 28 U.S.C. § 158(a) from an interlocutory order entered by the Bankruptcy Court on June 1, 2001, granting plaintiff's motion to certify a nationwide class.[1] CFC acknowledges that the Bankruptcy Court has not yet defined the class and has, in fact, directed the parties to submit proposed definitions by July 1, 2001. Consequently, CFC requests that this Court stay this

[1] This is the second appeal sought by CFC in this case. The first sought to appeal an interlocutory order denying CFC's motion to dismiss the debtor/plaintiff's class claims for lack of jurisdiction. *See, In re Powe*, Civil Action No. 00-0283-BH-L. CFC's first motion for leave to appeal was denied on May 1, 2000.

appeal pending the issuance of an order determining the class definition so that the entire class certification decision can be reviewed in a single proceeding. The Court acknowledges that such a procedure was permitted in *In re Sheffield*, Civil Action No. 01-0242-BH-L, but has since reconsidered the appropriateness of that procedure.

Consequently, the Court has taken CFC's motion for leave to appeal under submission and considered same together with the record as a whole. The Court finds it unnecessary to require a response from the debtor/plaintiff, Michael F. Powe. The Court concludes that CFC's motion is due to be denied. The Court specifically concludes that, as was true with respect to CFC's first attempt to appeal, the issues sought to be presented on this appeal do not involve "a controlling question of law as to which there is **substantial** ground for difference of opinion . . . **an immediate [resolution of which] may materially advance the ultimate termination of the litigation**." 28 U.S.C. § 1292(b) (emphasis added). The Court further finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that the rulings at issue could escape effective review on appeal after a final judgment.

It is therefore **ORDERED** that CFC's motion for leave to appeal be and is hereby **DENIED** and that this action be returned to the Bankruptcy Court forthwith.

DONE this 11th day of July, 2001.

/s/ W. B. Hand
SENIOR DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

MICHAEL F. POWE Debtor.	Case No. 98-10935-MAM-13
MICHAEL F. POWE Plaintiff,	
THERESA MOORE BALLARD, Intervener,	Case No. 98-13377-WSS-13
v.	Adv. No. 99-1121
CHRYSLER FINANCIAL CORPORATION, L.L.C. Defendant.	

ORDER GRANTING IN PART PLAINTIFFS' MOTIONS TO COMPEL AND DEFENDANT'S MOTION TO CLARIFY

Steve Olen, Mobile, Alabama, Attorney for the Plaintiff

Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiff

Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiff

C. Lee Reeves, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

Rhonda L. Nelson, San Francisco, California, Attorney for Chrysler Financial Corp, LLC

This matter came before the Court on the amended motion of Chrysler Financial Corporation ("CFC") for clarification of the Court's order of August 23, 2002. The case is also before the Court on the first and second

motions of the plaintiffs to compel answers to interrogatories by CFC. This Court has jurisdiction to hear this matter pursuant to 11 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. The clarification motion sprang from the hearing on the first motion to compel. The Court "invited" CFC to file the clarification request when it became evident that CFC's answers to interrogatories were going to require extensive investigative work to answer (at least as CFC saw it). For the reasons stated below, the Court is granting in part both the clarification motion and the motions to compel.

PROCEDURAL HISTORY

The Court will not recite all of the history of how this case arrived at the posture it is in. It is enough to say that, after a trial of part of the case, the proofs of claim now at issue are only those contained in plaintiffs' Exhibits 103 and 113.

The class's interrogatories seek to have CFC disclose as to the proofs of claim in Exhibits 103 and 113 which proofs of claim contain an attorneys fee charge that was not affirmatively disclosed on the proof of claim itself and which proofs of claim do *not* contain an attorneys fee charge at all. CFC responded to the interrogatories with the following defenses: (1) the answers to the request were capable of being ascertained by the plaintiffs as easily as CFC from the chapter 13 case files at issue or from CFC attorneys' files to which CFC would grant plaintiffs access; (2) some proofs of claim were filed before January 1, 1994, the specified class

period; (3) many cases where fees were included have been dismissed, converted, relief from the automatic stay has been granted and the collateral picked up, payments have been made outside the bankruptcy case, or the CFC debt was "crammed down" and is being paid less that 95%; (4) the request is overly broad, unreasonably burdensome, unreasonably expensive, irrelevant, immaterial, and not calculated to lead to relevant or admissible evidence, and requires CFC to rely on information provided by third parties since CFC has retained outside attorneys to handle the cases; or (5) even if attorneys fee charges are not disclosed in the proofs of claim, some other disclosure of the fees has been made to debtors or debtors' counsel.

CFC argues that its defenses are valid and that its discovery responses are proper. It argues that there is no point in further discovery about proofs of claim where no fees will ever be collected even if the attorneys fees were not adequately disclosed or disclosed at all. If a case has been dismissed or converted, relief from the stay has been granted or the case pays less than the full amount of CFC's claim, then no fee will ever be paid to CFC. In other words, CFC argues "no harm, no foul."

Plaintiffs argue that CFC should not be able to make its own determination at this juncture in the discovery that it need not produce certain proofs; plaintiffs should be able to know, at the least, before the Court decides the clarification issue, how many proofs of claim contain fees with no disclosure on the proofs of claim themselves.

CFC's clarification motion and the issues it raises are related to this discovery request. In CFC's clarification motion, it seeks to have the Court decide now whether the defenses raised to the interrogatories will preclude ultimate recovery by the plaintiffs. This clarification would lower costs and shorten discovery at a minimum. If the Court makes a broad enough decision on the relief CFC seeks, there will be no need for further trial at all. CFC asserts that if the proofs of claim in which no fee can ever be collected are excluded, a certifiable class does not exist. The only remaining class members will have individual, personal defenses to the claims of the class and therefore their cases will need to be individually tried. The class would lack commonality.

A.

Motion to Clarify

CFC's motion for clarification includes many issues, although in most respects they are two issues phrased many different ways.

1. Do chapter 13 debtors from whom CFC has not and will never collect an attorneys fee have any standing as members of the certified class?

2. If the class members who have undisclosed fees in the proofs of claim filed in their cases by CFC are subject to defenses of CFC that will require individual proof, would the class members be a true class with the required commonality of a class?

1.

The relief sought in this lawsuit is an injunction against CFC requiring it to expunge any fees added to debtors accounts. As an incidental part of this relief, any fees already paid by debtors to CFC would be refunded. In CFC's answers to interrogatories provided to date, it discloses that many of the class members have had an event occur in their cases that will prevent CFC from ever recovering a fee. Their cases have been dismissed; or their cases have been converted to chapter 7 cases; or CFC has been granted relief from the stay and repossessed the vehicle so no secured claim exists anymore, or the case, although a plan has been confirmed, is paying CFC less than 95% of its claim; or the debtor is paying CFC outside the chapter 13 plan so that the proof of claim (and added fees) does not affect the debt.

These defenses, standing alone, do not necessarily mean that the debtors have no standing. The fact that the debtors' cases will never result in an award of fees and may never need the benefit of the injunction does not solve the problem. As explained in e.g., the *Slick* case, the debtors were harmed by creditors filing proofs of claim that did not disclose post petition fees. The harm may have been minimal, but if the fees were never disclosed to the debtors, the debtors' due process rights were violated. *Slick v. Norwest Mortgage, Inc.,* Case No. 98-14378, Adv. No. 99-1130, Order Awarding Judgment to Plaintiffs (Bank. S.D. Ala. May 10, 2002). They never had the opportunity to object to the fees. Conversely, if the fees were disclosed in some manner, then there was no due process violation. As stated in the Slick opinion, the failure to disclose fees at all may be a violation of § 105 of the Code as an abuse of the bankruptcy process.

Id. The issue is whether the failure to disclose is knowing or intentional. Such might be the case if the nondisclosure is the normal pattern or practice of CFC or its attorney representatives.

Therefore, the Court cannot simply conclude that the fact that a fee will never be paid is sufficient to exclude a plaintiff from the class. The issue for § 105 purposes will be whether it was a pervasive enough practice to be an abuse of the system – even if the debtor will never pay the fee.

2.

If the practice of CFC's counsel is to disclose the fee in some manner to debtor's attorneys or debtors, then there are no grounds for sanctions and no grounds for an injunction or damages and no certifiable class. If the practice of CFC's counsel (or any one or more of them) is not to disclose the fee at all – as in the *Slick* case – then there may be a probable cause of action as to a class of claimants. The practice need not be the practice of all CFC counsel. The practice at issue may be only as to certain counsel. For instance, the evidence has made clear that Roger Efremsky, one of CFC's counsel, did disclose any fees he charged.

Therefore, a class of plaintiffs with a common issue will only be present if there is a pervasive practice of nondisclosure by one or more attorneys. If the general practice was not the issue, the claims of class members would be personalized claims not capable of class resolution.

Therefore, CFC's motion to clarify is granted to the extent of clarifying that the practice of nondisclosure must be pervasive, not sporadic or nonroutine, in order for class relief to be afforded to the class.

B.

Motion to Compel

Based upon the practice or pattern requirement for class relief, it is appropriate for CFC to be required to disclose which proofs of claim include attorneys fees and which do not. After that disclosure is made, plaintiffs' counsel will be in a position to determine whether there is a discernable pattern to [sic] nondisclosure in proofs of claim themselves. If there is, the plaintiffs and defendant can then do further discovery, if warranted, as to whether counsel for CFC had any pervasive pattern or practice of other disclosure of the attorneys fee to debtor or debtor's counsel.

Therefore, plaintiff's motion to compel should be granted to the extent of requiring CFC to answer which proofs of claim contain attorneys fees that are not disclosed in the proof of claim itself and which do not.

The Court concludes that CFC is in a position, through its outside counsel, to produce more efficiently than the plaintiffs, the proofs of claim, separated by whether a fee was paid or not. The documents are within the control of CFC's representatives (its attorneys). Defendant can more easily determine whether a fee was charged or not.

IT IS ORDERED:

1. Defendant's motion to clarify is GRANTED to the extent of requiring, for class relief, a pervasive practice or pattern of nondisclosure of proof of claim preparation attorneys fees in proofs of claim.

2. Plaintiff's motion to compel is GRANTED to the extent of requiring the defendant to disclose which proofs of claim in plaintiffs' Exhibits 103 and 113 contain attorneys fees that are disclosed on the face of the proof of claim and which do not.

Dated: November 14, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re	
MICHAEL F. POWE	Case No.
Debtor.	98-10935-MAM-13
MICHAEL F. POWE	
Plaintiff,	
THERESA MOORE BALLARD,	Case No.
Intervenor,	98-13377-WSS-13
v.	Adv. No. 99-1121
CHRYSLER FINANCIAL CORPORATION, L.L.C.	
Defendant.	

ORDER DENYING CHRYSLER'S MOTION TO DETERMINE THAT NAMED PLAINTIFFS HAVE NO STANDING TO BE CLASS REPRESENTATIVES AND TO DISMISS ALL FURTHER CLASS PROCEEDINGS

Steve Olen, Mobile, Alabama, Attorney for the Plaintiff

Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiff

Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiff

C. Lee Reeves, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

Rhonda L. Nelson, San Francisco, California, Attorney for Chrysler Financial Corp, LLC

This matter came before the court on the motion of Chrysler Financial Corporation ("CFC") to determine that

named plaintiffs have no standing to be class representatives and to dismiss all further class proceedings. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the motion.

Chrysler alleges that the named plaintiffs in this class action suit have no standing to pursue claims against Chrysler because of the Court's ruling of May 10, 2002. That ruling, after a trial of the case on the merits, held that the claims of the named plaintiffs against CFC were due to be denied. The named plaintiffs were the class representatives for a class certified by the Court on June 1, 2001. Other members of the class may still have viable claims against Chrysler as outlined in the Court's order of July 3, 2002 and an order issued on August 23, 2002 on Chrysler's motion to reconsider the July 3, 2002 order. Specifically, if any debtors had proofs of claim filed in their cases which did not disclose that attorneys fees (postpetition) were being charged as part of the claim and that fact was not otherwise disclosed or a fee approved by the Court, then a claim against Chrysler is viable. *Slick v. Norwest Mortgage, Inc. (In re Slick),* Case No. 98-14378, Adv. No. 99-1136, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002); *Harris v. First Union Mortgage Corp. (In re Harris),* Case No. 96-14029, Adv. No. 99-1144, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002).

Chrysler's position is that once the named plaintiffs' claims were denied in a judgment on the merits, the

lawsuit needs to be dismissed. Since the class representatives, at judgment, lack standing, the case cannot survive regardless of the existence of other viable claims.

Chrysler supports its position with two Eleventh Circuit cases: *Franze v. Equitable Assurance,* ___ F.3d ___, 2002 WL 1482778 (11th Cir. 2002) and *Piazza v. Ebsco Industries, Inc.,* 273 F.3d 1341 (11th Cir. 2001). Chrysler asserts that these cases conclude that if named class representatives suffer no injury in fact, they have no standing to pursue their claims and cannot be class representatives. If they cannot be class representatives (and no other Alabama debtors can be class representatives because they are in the same position), then the case cannot survive. Chrysler asserts that this is not a situation in which a class representative's claim became moot. In this case, no Southern District of Alabama debtor ever had a viable claim from the beginning.

In the *Franze* and *Piazza* cases, the Eleventh Circuit held that the cases could not be certified when the named class representative had a claim that was barred by a statute of limitations. In *Piazza,* the bar date for a malpractice claim had passed over one year before suit was filed. In *Franze,* the named plaintiffs commenced the suit in 2001, more than six years after the expiration of the limitations bar.

The Court concludes that these cases are not dispositive of the issue of standing in this case. The situations of Powe and Ballard were very different from that of Franze and Piazza. Powe and Ballard had viable claims under the classes as defined by the Court in the class certification order in the case. The class was:

> All bankruptcy debtors who have filed a Chapter 13 petition on or after January 1, 1994 (1) who had proofs of claim filed in their cases by Defendant Chrysler Financial that included attorneys fees in the total amount claimed but which (a) did not disclose postpetition fees at all, or (b) did not disclose them with sufficient specificity; (2) in whose cases Defendant Chrysler Financial did not file a specific application for these fees which was approved by the United States Bankruptcy Court; and (3) in all districts in which Chrysler Credit Corporation has not been sued in a class action suit which pertains to the issues raised in this suit.

Powe and Ballard's claims were not void from the beginning because of a clear bar to their claims such as a statute of limitations. Powe and Ballard's claims became void because of a later ruling on the merits of the plaintiff class' case that significantly narrowed the viable class. The case, at its inception, was broadly conceived by the plaintiffs to include cases with disclosed and undisclosed bankruptcy attorneys fees that were not approved by court order. As narrowed by the Court after a trial on the merits, the viable claims were only those of debtors with proofs of claim filed by Chrysler that contained undisclosed attorneys fees. This is not like the *Franze* and *Piazza* cases in which the claims were ineligible from the start.

The Court found no cases directly on point. The cases the Court concludes are more analogous to this case involve the situation in which a named plaintiff's case becomes moot. *E.g., United States Parole Commission v. Geraghty,* 445 U.S. 388 (1980). In *Geraghty,* the class representative in a class action suit was released from

prison during his appeal of a district court's denial of certification of a class of prisoners challenging the validity of parole release guidelines. The Parole Commission argued that, upon release, Geraghty lacked standing due to the expiration of his claim. The Supreme Court held that Geraghty had sufficient standing to appeal the denial of class certification. "When the claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation." *Id.* at 398 (cites omitted). The Court further stated:

> [W]here the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake.

Id. at 398. Powe or Ballad could certainly file other chapter 13 cases and could file them in places other than Alabama. The issue could reoccur for them even if that possibility is remote. This is exactly what *Geraghty* required to prevent mootness.

A Fifth Circuit decision also spoke to a similar situation. In *Thurston v. Dekle,* 531 F.2d 1264 (5th Cir. 1976), the Court was faced with a class action suit by discharged city employees. The district court awarded back pay to the employees under 42 U.S.C. § 1983. The Fifth Circuit reversed because, at that time, employees could not sue "individual members of a municipal board or agency for restitution or damages where the practical effect was to use those defendants as conduits to the city treasury." *Id.* at 1269. Furthermore, the court had to decide whether the named plaintiff, Thurston, had standing to raise other

issues that the suit could validly raise when his only claim was for back pay. The court held that Thurston did have standing even though he did not, after the Fifth Circuit's ruling, have any back pay claim.

> Thurston's standing was not factually mooted; it fell away because of a subsequent legal interpretation. . . . Use of the conventional form of standing analysis leads to the conclusion that this case should be [dismissed] because no named plaintiff had standing. However, to do so exalts form over substance because such a formulistic approach never pauses to look past the usual procedural requisites to test for the basic substance these procedures seek to enforce. [The case of] Muzquiz, which denied subject matter jurisdiction to Thurston, and thereby took away his standing, was unknown to the parties and the lower court throughout the trial. . . . Throughout this case Thurston believed (as did the lower court) that he had real stake in the outcome. . . . Thus it would not serve standing's ultimate purpose to hold that the adversary context that truly prevailed throughout the cause was somehow lost even before Thurston, or the court knew it was gone. To [dismiss] this case on the ground of lack of standing will predictably result in another attack on these same ordinances. . . . A decision which would accomplish no more than relitigation of a controversy already adequately litigated can serve no jurisprudential purpose.

Id. at 1270-71. This decision was subsequently vacated and the above language deleted from the opinion. *Thurman v. Dekle,* 578 F.2d 1167 (1978). The deletion was made, not because the Fifth Circuit changed its mind about its statement, but because the U.S. Supreme Court

had given Thurston standing by reviving his back pay claim right in *Monell v. Dep't of Social Services of City of New York,* 436 U.S. 658 (1978) and the discussion was unnecessary. Whether part of a vacated decision or not, the reasoning is still sound.

Powe and Ballard were thought to be viable named plaintiffs at the institution of this suit. The plaintiffs and Court believed that Powe and Ballard presented colorable claims. It was only after certification of a class and trial on the merits that their claims were denied. Believing their claims to be valid, they prosecuted the suit appropriately. Other class claims may still be viable. If this suit was dismissed, a new suit would likely be commenced to deal with the same issues. Putting form over substance in this standing issue would not be equitable or sensible.

Chrysler raises other issues in conjunction with the standing issue that will be addressed briefly. First, Chrysler asserts that the Rule 23(a) standards are not met as to the remaining plaintiffs. The court disagrees to the extent the class members have cases in which undisclosed attorneys fees have been assessed in Chrysler proofs of claim. The Court's opinions in the Slick and Harris cases indicate why the Court concludes this is true. *Slick v. Norwest Mortgage, Inc. (In re Slick),* Case No. 98-14378, Adv. No. 99-1136, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002); *Harris v. First Union Mortgage Corp. (In re Harris),* Case No. 96-14029, Adv. No. 99-1144, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002).

Chrysler makes an issue of the fact that the class has been decertified. This was due to the court's erroneous understanding of the claims produced at trial. The Court

concluded that there were no undisclosed fees. As the evidence now stands based upon the Court's reconsideration of its ruling, there may be undisclosed fees. If there are, those claims are part of the previously certified class. The Court is reconstituting the class in this order.

Second, Chrysler alleges that there is no commonality because Chrysler's outside attorneys used different procedures in preparation and filing of proofs of claim. The court concludes that if any of the attorneys included undisclosed claims for attorneys fees, those claims have sufficient commonality to constitute a class. The same is true of typicality.

Third, Chrysler asserts that a Rule 23(b)(2) class is improper since damages have been assessed in other similar cases decided by this Court. Chrysler also asserts that in settled cases, the parties are converting the cases to Rule 23(b)(3) cases for settlement purposes. The Court concludes its prior rulings on this issue are correct and will not be changed. The main relief granted in all of the cases is expungement of the fees from debtors' accounts and an injunction against future charges of undisclosed fees. Damages are a de minimis adjunct – refunds of fees to the debtors who actually paid them. The other amount awarded is a sanction for actions under § 105 of the Bankruptcy Code because there [sic] actions have been an abuse of the process. That award is separate and apart from the class relief. The posture of the settled cases as Rule 23(b)(3) cases is irrelevant. What happened in the settlement negotiations is not known. The relief agreed to is also different that what this Court ordered in its own orders.

Therefore, Chrysler's motion is due to be denied in all respects.

IT IS ORDERED that the motion of Chrysler Financial Corporation to determine that named plaintiffs have no standing to be class representatives and to dismiss all further class proceedings is DENIED.

IT IS FURTHER ORDERED that the order of July 3, 2002 stands unamended in all respects except:

1. A status hearing will be held on September 26, 2002 at 9:00 a.m. in Courtroom 2, United Sates Bankruptcy Court, 201 St. Louis Street Mobile, AL 36602.

2. The class of claimants previously certified on July 27, 2001 is reconstituted based upon the Court's ruling in its order of July 3, 2002 and this order.

Dated: August 23, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re	
MICHAEL F. POWE	Case No.
Debtor.	98-10935-MAM-13
MICHAEL F. POWE	
Plaintiff,	
THERESA MOORE BALLARD,	Case No.
Intervenor,	98-13377-WSS-13
v.	Adv. No. 99-1121
CHRYSLER FINANCIAL CORPORATION, L.L.C.	
Defendant.	

ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDMENT OF THE COURT'S ORDER OF JULY 3, 2002

Steve Olen, Mobile, Alabama, Attorney for the Plaintiff

Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiff

Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiff

C. Lee Reeves, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

Rhonda L. Nelson, San Francisco, California, Attorney for Chrysler Financial Corp, LLC

This matter came before the Court on the motion of Chrysler Financial Corporation ("CFC") requesting the Court reconsider and amend its order of July 3, 2002. The Court has jurisdiction to hear this matter pursuant to 28

U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the motion.

CFC seeks reconsideration or amendment of the July 3, 2002 order on three grounds: (1) the Court erroneously found Chrysler had an "agreement" with the plaintiffs to produce only proofs of claim that contained attorneys fees; (2) the Court improperly shifted the burden of proof to CFC to prove that there was no fee in each proof of claim or that "the fee was disclosed or approved in another manner." Order p. 4; and (3) the Court does not have core jurisdiction over the proofs of claim that now remain at issue. The Court will address each issue in turn.

1.

The Court stated that CFC and the plaintiffs had an agreement that CFC would produce only proofs of claim that included attorneys fees when it answered plaintiffs' discovery requests. The Court believes, from the evidence provided at the last hearing, that the word "agreement" correctly describes the parties' postures. CFC's attorneys indicated in all communications with plaintiffs that it was providing only proofs of claim with fees. The plaintiffs agreed to this limitation on disclosure. The plaintiffs' original requests were for broader production. Another word that might describe the situation as well is "understanding." The fact is that plaintiffs had a right to rely on CFC's statements as to what was being produced. There was no convincing contrary evidence produced to show that CFC did not tell plaintiffs it was producing only

claims with fees. Therefore, whether the facts present an "agreement," or an "understanding" or a fact pattern in which, even without a formal agreement, plaintiffs had a right to rely on CFC statements, the Court's decision is the same. The word will not be changed in the order.

2.

CFC alleges that the Court has erroneously shifted the burden of proof to it in any further proceedings in this case. The Court concludes that it has not improperly shifted the burden.

As stated in the July 3, 2002 order at the trial of this case on the merits, "the burden of proving an undisclosed fee was included in [the] . . . claims [of Chrysler] was on the debtor plaintiffs." Order p. 3. At trial, the Court found that the plaintiff class did not meet that burden. This failure of proof was found because the Court thought plaintiffs had given the Court no claims with undisclosed fees.[1]

The plaintiffs, in their motion to reconsider, alleged that the Court was wrong about what plaintiffs' evidence proved due to the CFC claims production. The Court was not aware that CFC had told plaintiffs that it had instructed its outside counsel to produce only claims with fees. Therefore, if the evidence at trial included any proofs of claim with no fees disclosed, then the plaintiffs had met their burden of proof as to those debtors. Since CFC

[1] The Court held that as to claims in which fees were disclosed, there was no relief it could award.

produced only claims with fees (or so the plaintiffs understood and they relied on that understanding), then plaintiffs needed to do no more to meet their burden of proof in their case in chief than to introduce the proofs of claim with no fees disclosed. They did that. *See, e.g.,* footnote 11 at page 7 of order dated May 10, 2002.

At that point, as in any case, the burden of proof shifts to the defendant to disprove the plaintiffs' prima facie case. This is the posture of the case at this juncture as to proofs of claim with no disclosures. CFC must now go forward to show that the claims involved included no fees and these claims were produced in error or that "the fee was disclosed or approved in another manner." Order p. 4. If Chrysler cannot do this, the case, as to the undisclosed fees, is like other cases of this Court with completely undisclosed fees and the Court's conclusions of law in those cases will likely be applicable. *Slick v. Norwest Mortage, Inc. (In re Slick),* Case No. 98-14378, Adv. No. 99-1136, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002); *Harris v. First Union Mortgage Corp. (In re Harris),* Case No. 96-14029, Adv. No. 99-1144, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002).

3.

Chrysler alleges that the Court does not have core jurisdiction over the claims of the class members who remain. The proofs of claim filed in the Southern District of Alabama did disclose any attorneys fees charged. Therefore, Chrysler asserts, since no debtor from this district is a member of the class who will be receiving a

judgment in his or her favor (if any such judgment is entered), then this Court lacks core jurisdiction.

The Court will not reiterate its ruling on jurisdiction in this order, but its position is the same. *In re Noletto,* 244 B.R. 845 (Bankr. S.D. Ala. 2000). Once the case was certified, jurisdiction over all of the claims was proper. Even if this Court does not have core jurisdiction, the court reports and recommends to the District Court so that it can adopt this court's findings and conclusions pursuant to Fed. R. Bankr. P. 9033 if appropriate. To hold that the class is improper, after certification, because the claims of the initial class representatives are found not to be actionable, would be inappropriate. Their ultimate lack of standing should not prejudice the rights of the remaining potential class members who will lose their claims if this action is dismissed. A new class representative may be substituted. *In re Noletto*, 281 B.R. 60 (Bankr. S.D. Ala. 2001).

In a separate order the Court is addressing CFC's related argument that this case should be dismissed due to the class representatives' lack of standing. That order and its reasoning are incorporated by reference.

IT IS ORDERED that Chrysler Financial Corporation's motion for reconsideration and amendment of the Court's order of July 3, 2002 is DENIED.

Dated: August 23, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re	
MICHAEL F. POWE	Case No.
Debtor.	98-10935-MAM-13
MICHAEL F. POWE	
Plaintiff,	
THERESA MOORE BALLARD,	Case No.
Intervenor,	98-13377-WSS-13
v.	Adv. No. 99-1121
CHRYSLER FINANCIAL CORPORATION, L.L.C.	
Defendant.	

ORDER GRANTING IN PART PLAINTIFFS' MOTION TO ALTER OR AMEND THE COURT'S ORDER OF MAY 10, 2002

Steve Olen, Mobile, Alabama, Attorney for the Plaintiff

Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiff

Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiff

C. Lee Reeves, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

Rhonda L. Nelson, San Francisco, California, Attorney for Chrysler Financial Corp, LLC

E. Barry Johnson, Birmingham, Alabama, Attorney for Chrysler Financial Corp. LLC

This case is before the Court on the plaintiffs' motion to alter or amend the judgment of May 10, 2002. The

Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) or, if it is not, this Court reports and recommends to the District Court that it adopt this ruling as its ruling pursuant to Fed. R. Bankr. P. 9033. For the reasons stated below, the Court is partially granting and partially denying plaintiffs' motion to alter or amend.

FACTS

The plaintiff class in this case requested discovery from Chrysler Financial Corporation of all proofs of claim filed by Chrysler in chapter 13 cases from 1994 to date. Chrysler employed numerous counsel since 1994 to handle bankruptcy cases. The number of outside counsel had decreased to 19 firms in 2002, but was over 100 in 1996. The Court estimated that about 40,000 chapter 13 cases were filed from 1994 to 2001 in which Chrysler was creditor. Due to the voluminous number of claims involved, Chrysler indicated that it would produce only proofs of claim that included an attorneys fee. Plaintiffs' counsel did not object to this procedure.

Plaintiffs' evidence presented at the hearing on the motion to reconsider showed that only proofs of claim which included an [sic] attorneys fees were produced by Chrysler. This fact was reiterated several times by the defendant. The most telling document in the Court's view about what plaintiffs believed Chrysler was providing is Chrysler's Reply to Plaintiffs' Opposition to Amended Motion to Strike filed April 17, 2001. On page 3, footnote 1, it states:

> Plaintiffs' counsel requested production from CFC of proofs of claim which included an attorney's fee in the total amount claimed.

Another indication of the parties' agreement is a stipulation of the parties recited at the beginning of the trial. It also indicated that the files of one law firm searched by Chrysler counsel's paralegal were searched for proofs of claim that "contained an attorney's fee in the total amount claimed." Trial Transcript, p. 89, line 19 to p. 90, line 17. The correspondence between counsel also makes clear what was being produced.

Chrysler does not dispute that it instructed its outside counsel to produce only proofs of claim with attorneys fees included. Chrysler's contention is that plaintiffs knew that at least some of the claims did not include fees, and, whether the claims included fees or not was not dispositive anyway.

At trial, plaintiffs submitted as evidence all of the proofs of claim produced by Chrysler. Some of them contained no disclosure of an attorneys fee on the face of the claim. Whether fees were charged and not disclosed was a critical element of plaintiff's case. *See, e.g., Slick v. Norwest Mortgage (In re Slick),* Case No. 98-14378, Adv. No. 99-1136, order of May 10, 2002 (Bankr. S.D. Ala. 2002).

Chrysler produced evidence to show that (1) some of the claims did not contain an attorneys fee and were mistakenly produced; (2) some of the fees, if not disclosed in the claims, were disclosed to the Court, trustee and/or debtors' counsel in other ways; and (3) some fees were approved in later court orders. This proof did not extend to

all proofs of claim produced by Chrysler and offered into evidence by plaintiffs.

In the Court's order, the Court found that some of the proofs of claim did not indicate that an attorneys fee was charged. The Court concluded that the burden of proving an undisclosed fee was included in these claims was on the debtor plaintiffs.

LAW

Plaintiffs ask the Court to reconsider its May 10, 2002 ruling on two grounds:

1. That the Court improperly placed the burden of proving the inclusion of an undisclosed attorneys fee in some Chrysler claims on the plaintiffs.

2. That the Court incorrectly held that the *Welzel* case should be applied retroactively to affect claims filed before the opinion's issuance on May 10, 2002.

The Court will deal with each issue in turn.

1.

A bankruptcy court can alter or amend a judgment pursuant to Fed. R. Bankr. P. 9023. This Rule incorporates Fed. R. Civ. P. 59 into the Bankruptcy Rules with limited exceptions that are not relevant here. The Rule states that a rehearing may be granted in a nonjury case "for any of the reasons for which rehearings have hereto fore been granted in suits in equity in the courts of the United States." In a nonjury matter, the Court has extensive leeway. It can "open the judgment if one has been entered,

take additional testimony, amend findings of fact and conclusions of law or make new [ones]." Fed. R. Bankr. P. 9023.

The Court concludes that it erred in placing the burden of proof on plaintiffs as to the issue of whether undisclosed fees were actually included in the proofs of claim produced by Chrysler. Based upon the parties' agreements and oral and written submissions to the Court, plaintiffs had the right to rely on Chrysler's agreement to produce only proofs of claim with fees included. The court did not understand the production posture at the time of ruling. Therefore, plaintiffs did meet their burden of proof in their case in chief of showing undisclosed fees in proofs of claim. At that point, in Chrysler's case on defense, it had the burden of proving that any proofs produced that on their face disclosed no fee either did not include a fee or the fee was disclosed or approved in another manner.

The court will set aside the judgment in order to allow testimony and rebuttal on this single issue as soon as possible. The Court is not reopening the case in any other respect. Evidence will be directed at proving that fees were not undisclosed or that if undisclosed fees were included in the proofs of claim they were later disclosed, and rebuttal of the same.

2.

Plaintiffs' second ground for altering or amending the judgment is that the *Welzel* case does not cure pre-*Welzel* disclosure deficiencies. *In re Welzel,* 275 F.3d 1308 (11th Cir. 2001) is an Eleventh Circuit Court of Appeals decision rendered on December 10, 2001. It was issued after the

trial in this case had been completed, but before the Court issued its decision on May 10, 2002. *Welzel* resolved what the Eleventh Circuit determined was a matter of first impression in the Circuit. *Id.* at 1310. *Welzel* held that Bankruptcy Code Section 506(b) "blanketly applies the reasonableness standard" to pre- and postposition attorneys fees. *Id.* at 1316. Pre- and postpetition fees are to be judged in the same manner. There is no differentiation to be made between them.

Prior to *Welzel,* this court and other courts believed that there was a higher level of scrutiny applied to postpetition fees than prepetition ones. *E.g., In re Carey,* 8 B.R. 1000 (Bankr. S.D. Cal. 1981); *In re Shriock Constr., Inc.,* 176 B.R. 176 (Bankr. D.N.D. 1994), *rev'd* 104 F.3d 200 (8th Cir. 1997). Therefore, this Court believed, at the commencement of this case, that creditors should be required to state whether any fees they were claiming were pre- or postpetition. Post *Welzel*, courts and attorneys in the Eleventh Circuit know this is not true. A disclosure of the fact that attorneys fees are being assessed should be sufficient to trigger a proper review by any interested party.

Plaintiffs argue that the Court should not retroactively apply *Welzel* to debtor cases that had claims filed before December 10, 2001. Debtors and trustees could not have known that any reasonable disclosure of fees was enough to meet due process concerns. The testimony of the debtors' counsel witnesses and the chapter 13 trustee indicated that, if they saw a statement indicating that "attorneys fees" were included in the proof of claim, they assumed that the fees were prepetition fees. They believed that these fees were unlikely to be disallowed by a judge

since the fees were judged on a more lenient standard. Therefore they did no object.

Debtors' counsel asserts that this ruling is akin to a change in the law that, without specific authority to do so, should *not* be applied retroactively. To do so prejudices parties unfairly. *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 114 S. Ct. 1483, 1506, 128 L. Ed. 2d 229 (1994) (noting the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment").

Chrysler asserts that *Welzel* changed no law. It was merely interpretation of the law as it stood. Everyone had a right and ability to know what § 506(b) stated and act accordingly. The fact that the Eleventh Circuit had not ruled on the matter at issue before did not mean plaintiffs should not be bound by what the Eleventh Circuit in *Welzel* said the law was. *Welzel* reversed no prior Eleventh Circuit case on the issue.[1]

The Court concludes that plaintiffs' motion on this ground is due to be denied. The standard to be used in determining whether a court ruling should apply retroactively was set by the U.S. Supreme Court in *Chevron Oil v.*

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[1] The Eleventh Circuit Court of Appeals did say *Welzel* "displace[d]" an earlier Eleventh Circuit case. *Mills v. East Side Investors (In re East Side Investors,* 694 F.2d 242 (11th Cir. 1982)). However, *East Side Investors* did not speak to the issue of pre- and postpetition fee review differences. It spoke only to whether state law or federal bankruptcy law governed attorneys fees issues. The case dealt with pre-Bankruptcy Code law which did not contain § 506(b). Therefore, debtors' counsel and trustees had no direct authority upon which they were relying pre-*Welzel.*

Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). It stated that the test had three parts:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice of hardship by a holding of nonretroactivity. 404 U.S., at 106-107, 92 S. Ct., at 355 (citations and internal quotations omitted).

The first part of the test is not met. There was contrary authority (at least as to contractual prepetition fees) before *Welzel* in four circuits. *Welzel* at 1315. Therefore, debtors' counsel and trustees and other parties in interest were on notice of contrary authority. Since this is a nationwide class, what the Eleventh Circuit's position was at any point in time is not determinative of the issue. Second, the retroactive effect will not impede the operation of the rule. It will further it by applying it to all of Chrysler's fees. This is appropriate in light of the fact that counsels' fees that are being considered came from all over the Untied States. Third, counsel's mistaken reliance on other authority is not sufficient to allow different rules to apply pre- and post-*Welzel*. There may be inequity for Eleventh Circuit counsel who relied on contrary case law, but not for

counsel in other circuits. The motion is therefore denied on this ground.

IT IS ORDERED:

1. The plaintiffs' motion to alter or amend the order dated May 10, 2002 is GRANTED to the extent of allowing a reopening of the case for the limited purpose of allowing Chrysler to put on evidence as to the proofs of claim in evidence that do not disclose a fee and to allow plaintiffs' rebuttal of that evidence.

2. A status hearing will be held on **August 6, 2002 at 10:30 a.m.** at the United States Bankruptcy Court, Courtroom 2, 201 St. Louis Street, Mobile AL 36602.

3. The plaintiffs' motion to alter or amend to the extent it goes retroactive effect to the *Welzel* case is DENIED.

Dated: July 3, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT,
SOUTHERN DISTRICT OF ALABAMA

In re

MICHAEL F. POWE[,]
Debtor.

Case No.
98-10935-MAM-13

MICHAEL F. POWE[,]
Plaintiff,

Case No.
98-13377-WSS-13

THERESA MOORE BALLARD,
Intervenor,

v.

Adv.No. 99-1121

CHRYSLER FINANCIAL
CORPORATION, L.L.C.[,]
Defendant.

ORDER GRANTING JUDGMENT TO CHRYSLER FINANCIAL CORPORATION

Steve Olen, Mobile, Alabama, Attorney for the Plaintiff

Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiff

Donald J. Stewart, Mobile, Alabama, Attorney for the Plaintiff

C. Lee Reeves, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

Rhonda L. Nelson, San Francisco, California, Attorney for Chrysler Financial Corp, LLC

E. Barry Johnson, Birmingham, Alabama, Attorney for Chrysler Financial Corp., LLC

This matter came before the Court for trial the week of December 10, 2001. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is granting a judgment in favor of the defendant, Chrysler Financial Corporation, L.L.C.

FACTS

Michael Powe filed a chapter 13 bankruptcy case on March 12, 1998. He had a 1994 Plymouth Grand Voyager vehicle secured by a loan to Chrysler Financial Corporation ("CFC."). CFC was listed as a creditor of Powe in his schedules. Powe valued his vehicle at $15,000 and listed CFC's claim at $14,000. On April 14, 1998, CFC filed a proof of claim listing a total debt owed by Powe of $11,878.13. There was a handwritten notation at Box 5 of the claim that read "Includes $225.00 Atty fees." Powe was in default on his loan prepetition. Also on April 14, 1998, Chrysler filed an objection to the debtor's plan which stated "As an over-secured creditor, Chrysler's proof of claim includes $225.00 in reasonable attorney fees to which Chrysler is entitled both under the terms of the Loan Documents and the Bankruptcy Code." The objection to confirmation was settled and Chrysler withdrew its objection to the plan. Chrysler and Powe agreed Chrysler would be paid $14,580 over the life of the plan at $250 per month in full satisfaction of all amounts due.

Irvin Grodsky, the debtor's attorney, stated that attorney fees were never discussed with the attorney for

Chrysler. Powe and Grodsky were only concerned about the affordability of the monthly payment.

This adversary case was filed on July 1, 1999. In July 2000, Powe defaulted for the first time postpetition on his plan payments. The Court held a hearing on August 2, 2000, at which time Chrysler and Powe settled the matter. The Court indicated that Chrysler was entitled to an attorneys fee and costs. Chrysler stated that it struggled with how to word the order in regard to the settlement because it usually did not assess additional fees against a debtor for a relief from stay motion. Powe's counsel was unaware of Chrysler's position. The order presented to the Court requested a $225.00 attorneys fee and disclosed that it was the same fee included in Chrysler's proof of claim as part of the $14,580. The Court entered the order on August 15, 2000. On December 6, 2001, Powe surrendered the car to Chrysler after again becoming delinquent.

Mr. Powe is employed by the Mobile Public Schools and has a master's degree in business. He attended part of the trial in this suit, although not all of it. He has not read any of the pleadings or discovery in the case other than his own deposition. He has a very general understanding of the case.

Theresa Moore Ballard was Theresa Moore throughout most of her case.[1] She filed her chapter 13 case on September 18, 1998. She had a loan to Chrysler Financial Corporation secured by a 1994 Plymouth Voyager van. She

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[1] Ms. Moore married about the time she paid off her chapter 13 case. Since her file is labeled Theresa Moore, the Court will call her that in this opinion.

listed her debt to Chrysler in her schedules at $7,600. Chrysler filed a proof of claim for $8,220 which stated that it "includes attorney's fees of $225 and precomputted (sic) interest of 8.75." The claim form was signed and filed by a paralegal in the office of Dreher, Langer & Tomkies of New Orleans, Louisiana.

Chrysler did not object to Moore's plan and it was confirmed on March 22, 1999. Chrysler subsequently filed a motion for relief from stay that indicated Moore had failed to provide information about insurance on the vehicle. The motion was denied based upon Moore maintaining insurance. A second relief from stay motion was filed by Chrysler when Moore fell behind in her plan payments. Moore caught up the payments and Chrysler dismissed the motion. On January 18, 2001, Moore paid off her chapter 13 plan and subsequently received a discharge. This payoff occurred after a meeting on the same day with her bankruptcy counsel and class action counsel about the possibility of Moore joining this suit. At payoff, she was aware she was paying Chrysler's attorneys fees as well. However, in order to obtain a discharge, Moore had to pay off the entire balance owed to the chapter 13 trustee. On January 19, 2001, Moore moved to intervene in the suit.

Chrysler paid the Dreher law firm a flat fee of $275 for all of its services in the Moore bankruptcy case. Local counsel was paid $300 for two appearances at relief from stay hearings. The Dreher firm, not Chrysler, paid those fees.

Moore attended part of the trial, but not all of it. She has not read any of the pleadings in the case. She

understands the nature of the lawsuit in very general terms only.

CHRYSLER PRACTICES

Chrysler has had an ever increasing number of chapter 13 cases filed by debtors who claim Chrysler as one of their creditors. In 1996, about 5,000 chapter 13 cases nationwide involved Chrysler. In 2001, 12,000 cases involved Chrysler. Since 1994, an average 5,000 cases per year involving Chrysler debt have been filed (or 40,000 cases). Chrysler estimates that about 20% of chapter 13 debtors completed their plans and got a discharge (or 9,000 cases) since 1994.

Since at least 1994, Chrysler has hired an ever decreasing number of law firms to handle its bankruptcy cases nationwide. In 1996, there were 134 firms used by Chrysler. In 1996, that number had contracted to 24. As of January 1, 2002, there were 19 firms. Firms submit bids for the work and, at this time, firms that are chosen work on flat fees – one charge for all work required in a case. That fee varies depending upon the part of the country served. Flat fees have lowered Chrysler's costs of handling bankruptcy matters and have lowered the fees charged to debtors overall.

The attorneys must follow the Bankruptcy Performance Standards established by Chrysler. However, the standards do not state whether or when counsel may or should request attorneys fees or costs in chapter 13 cases. The standards do not require that disclosure of fees (if requested) be made in any particular form. In fact, Chrysler's designated corporate representative, Richard Engel, did not know before the commencement of this suit that

outside counsel were adding postpetition fees to some claims despite his extensive bankruptcy experience at Chrysler.

Chrysler did not receive copies of proofs of claim from counsel. The company kept track of each debtor's debt based upon its own internal numbers. If money was received from a debtor in excess of what Chrysler's records showed was owed, Chrysler credited the funds to an interest income category. There is no way that Chrysler knows if this money is an attorneys fee or interest income. Attorneys fees claimed in a proof of claim are paid if the chapter 13 case is paid in full.

CHRYSLER'S OUTSIDE COUNSEL PRACTICES

Because the Bankruptcy Performance Standards did not address the issue of attorneys fees, outside counsel for Chrysler have taken varied approaches to disclosure of their postpetition flat fees. In some cases, the fee was included with a notation on the claim form such as "includes attorneys fees of $225,[2] $290,[3]

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[2] Plaintiffs' Exhibits 91-95, 108, 106, Tab 1, 104, Tab 5, proofs of claim of Dreher, Langer & Tomkies, L.L.P. and Draper & Culpepper (at least one proof of claim stated no amount. It just stated it included "Attorneys Fees"); Exhibit 104, all tabs disclose that attorneys fees are assessed and most state amounts.

[3] Plaintiffs' Exhibit 114, Tab 3, Proof of claim of Hale, Headrick, Dewey, Wolf, Golwen, Thornton & Chance PLLC. (Ark., E.D.N.C., M.D.N.C.), Plaintiffs' Exhibit 104, Tab 2, Hale, Headrick, Dewey, Wolf, Golwen, Thornton & Chance PLLC. (lists fees as "attorneys fees") (Ark., Miss., Va., N.C. and S.C.) Tab 3, Porter & Hedges (S.D. Tex.) (all state attorneys fees charged, some claims state amount.); Plaintiffs' Exhibit 114, Tabs 5-8, (W.D.N.C., S.C., E.D. Tenn., E.D. Va., W.D. Va.) (states

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$325,[4] $410,[5] $315-350 and other sums."[6] [7] In still other cases, fees were disclosed as postpetition attorneys fees.[8] In others, attorneys fees were only included in a claim after a court order was entered specifically approving the

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amount and "attorney fees"); Tabs 9-10, Riezman Berger PC (states amount and "attorneys fees") (Ill.); Tab 11, 12, 13 & 14, Mapother & Mapother (Ky., Ind.) (includes amount and "attorney fees"); Tab 15, Kim Wilson (Utah) (includes amount and "legal fees"); Tab 16 & 17, Lyons, Doughty & Veldhuis (N.J., Del.) (no amount but states "attorney fees"); Tab 18-21, Dreher, Langer & Tomkies, L.L.P. (Miss., La.) (includes amount and "ATTY FEES" or "attorney fees"); Tab 22, P. Michael Richardson (N.D. Tenn.) (includes amount and "attorneys' fee"); Tab 23, David E. Drexler (W.D. Tenn.) (includes amount and "attorney fee").

[4] Plaintiffs' Exhibit 104, Tab 4, Shermeta, Chemko & Adams (E.D.Mich.).

[5] Plaintiffs' Exhibit 104, Tab 3, Porter & Hedges (S.D. Tex.).

[6] Plaintiffs' Exhibit 104, Tab 7, Engel, Hairson & Johanson, P.C. (N.D. Ala.) (no amount but states "attorney fees" included); Tab 8, Kim Wilson (Utah) (no amount but states "includes legal fees"); Tab 9, Lyons, Doughtry & Veldhuis (N.J. and Pa.) (no amount but states includes "attys fees"); Tab 10, Holland & Knight (N.D. Ga.) ("$275 attorney fees"); Tab 11, Riezman & Blitz, P.C. (Ill.) ($300 "atty. fees" or "attorney fee" or "atty's fee" or "attorney's fees"); Tab 12, Steven D. Lipsey (E.D. Tenn.) ($250 "Atty fee"); Tab 13, Stiles & Harbison (W.D. Ky.) ($190-200 "attorney fees") (S.D. Ill. and E.D. Ky.) (no amount but states "attorney's fees" or "atty fees"); Tab 15, George Rigely (W.D. Tex.) ($150 "atty. fee"); Tab 17, Michael L. Loyd & Assoc. (E.D. Okla. and W.D. Okla.) ($200-350 "attorney fees"); Tab 18, Carlton Fields (S.D. Fla.) (no amount but states "attorneys' fees").

[7] Plaintiffs' Exhibit 104, Tab 6, Mapother & Mapother (Ind., Ky., Ohio).

[8] Exhibit 106, Tab 3, Michael L. Loyd & Associates (W.D. Okla.); Debtor's Exhibit 106, Tab 2 and Exhibit 116, Tab 7 proof of claim of M. Michael Richardson (M.D. Tenn.); Exhibit 106, Tab 4, Dysart Taylor Lay Cotter McMonigle, P.C. (E.D. Mo.); Exhibit 106, Tab 3, Michael L. Loyd & Associates (W.D. Okla.).

fees.[9] In other cases, where Chrysler was unsecured or undersecured, no attorneys fee was added.[10] In some cases, no fees were disclosed and Chrysler indicated it was fully secured.[11] [12]

Chrysler called a number of witnesses to describe each firm's particular practice in regard to attorneys fee claims in proofs of claim. The practices are briefly catalogued below.

Oklahoma – According to Ms. Patsy Brown, an attorney with Michael L. Loyd and Associates, her firm put an attorneys fee of $100-400 in proofs of claim when Chrysler

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[9] All of Efremsky & Nagel fees (E.D. Ca.) per Roger Efremsky testimony. Plaintiffs' Exhibit 104, Tab 1.

[10] Plaintiffs' Exhibit 105, Tab 1, Hale, Headrick, Dewey, Wolf, Golwen, Thornton & Chance PLLC. (Districts in Ark., S.C., Tenn., and Va.); Exhibit 105, Tab 2, Porter & Hedges (S.D. Tex.); Tab 3, Shermeta, Chimko & Adams, P.C. (E.D. Mich.); Tab 4, Dreher, Langer & Tomkies (W.D.La.); Tab 5, Stone & Hinds, P.C. (M.D. Tenn.).

[11] Plaintiffs' Exhibit 113, Tabs 1-10, Hale, Headrick, Dewey, Wolf, Golwen, Thornton & Chance PLLC. (Ark., Miss., N.C., S.C.); Plaintiffs' Exhibit 103, Tab 1, Cooksey, Howard, Martin & Toolen (C.D. Calif.); Tab 2, Efremsky & Nagel (E.D. Calif.); Tab 3, Hale, Headrick, Dewey, Wolf, Golwen, Thornton & Chance PLLC. (Ark., Miss., N.C., S.C.); Tab 4, Porter & Hedges (S.D. Tex.); Tab 5, Shermeta, Chemko & Adams, P.C. (E.D. Mich. and W.D. Mich.); Tab 8, Engel, Hairston & Johanson, P.C. (N.D. Ala.); Tab 9, Snow, Christensen & Martineau (Utah); Tab 11, Stone & Hinds, P.C. (E.D. Tenn.); Tab 12, George Rigeley (W.D. Tex.); Tab 13, Michael Richardson; Tab 14, Michael Loyd & Assoc.

[12] Some proofs of claim were not clear about fees charged. Plaintiffs' Exhibit 103, Tab 6, Dreher, Langer & Tomkies, L.L.P. (claim lists $225 on line for "amount of arrearage and other charges at time case filed"); Tab 7, Mapother & Mapother (claim lists $640.68 on line for "amount of arrearage and other charges at time case filed"); Tab 10, Reizman & Blitz, P.C. (Ill.) (claim lists $225 or $300 on line for "amount of arrearage and other charges at time case filed").

was oversecured or there was a co-debtor, depending upon services provided. Loyd & Associates represented Chrysler from 1985 or 1987 through February 10, 1997. On some claim forms, there was a line item for "amount of attorneys fees for representation in bankruptcy." She used that line to disclose fees in the Western District of Oklahoma where the trustee required use of that form. Otherwise she includes the fees in item 4 on the official form as "attorneys fees."[13] She generally had a conversation with attorneys in the Eastern and Northern Districts of Oklahoma about her fees.[14] Debtors should know "attorneys fees" on claims filed were postpetition fees if item 5 is checked.

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[13] Plaintiffs' Exhibit 104, Tab 17.

[14] When the Court prevented certain testimony of Chrysler attorneys, Chrysler made an offer of proof with each Chrysler attorney witness about conversations each Chrysler attorney had with debtors' counsel in their jurisdictions. The proof offered was that debtors' counsel acknowledged to Chrysler's counsel that they understood Chrysler was charging an attorneys fee and that Chrysler's attorneys fee was a postpetition fee. The Court concluded that the testimony was hearsay. Chrysler stated that they only wanted to introduce the statements to show acknowledgments of the postpetition nature of fees were made by debtors' counsel, not that the fees were postpetition fees or not. The acknowledgments were out of court statements by nonparties (debtors' counsel). Although Chrysler alleged that the testimony was not made to prove the truth of the statements, the Court sees no other purpose for which it could be relevant. It was important to Chrysler to prove that debtors or their attorneys knew of Chrysler fees and knew that the fees were postpetition and, knowing that, that the debtors did not object to Chrysler's claims. Chrysler did not need to prove the state of mind or motives of its own attorneys. Using the acknowledgments of debtors' counsel to show Chrysler attorneys thought debtors' counsel understood the fees would have been proper for this purpose. But using the statements to prove debtors had knowledge of Chrysler's fees is a different matter. The parties who made the acknowledgment must testify so the meaning of their

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New Jersey, Pennsylvania and Delaware – According to Mr. David Lyons, his firm, Lyons, Doughty & Veldhuis, P.C., represented Chrysler on and off for the last 25 years. His firm's representation ceased in August 2001. His firm was paid $320 as a flat fee for all services ("cradle to grave") in each chapter 13 case. At one point, the proofs of claim he filed for Chrysler stated "contractual attorneys fees" or "fees" were charged.[15] Later when he used the official form, he included attorneys fees by stating "atty fees." Mr. Lyons only requested attorneys fees when he filed an objection to confirmation. He indicated he was

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statements can be plumbed. Chrysler cited two cases to the Court that are relevant. *U.S. v. Lynn,* 608 F.2d 132 (5th Cir. 1979) held that the out of court statements of a defendant used to show the reason for a victim's state of mind – fear – were admissible for that purpose. As stated in this case, the defendant's knowledge was not relevant to the notice and adequate disclosure issue. In *U.S. v. Parry,* 649 F.2d 292 (5th Cir. 1981), out of court statements the defendant made to his mother were admissible to show defendant's knowledge. Again, that is the opposite of the use of the statements of debtors' counsel by Chrysler. *See Weaver v. Tech Data Corp.,* 66 F. Supp. 2d 1258 (M.D. Fla. 1999). If the Court were to admit the evidence to show that Chrysler's attorneys thought debtor's counsel knew of Chrysler's fees and the fees' postpetition nature, the Court would consider that fact irrelevant. The test of adequate notice is what the debtors and their counsel *in fact* knew or should have known. *E.g., Christopher v. Kendavis Holding Co. (In re Kendavis Holding Co.),* 249 F.3d 383, 386 (5th Cir. 2001) ("'an elementary and fundamental requirement of due process . . . is notice reasonably calculated . . . to apprise interested parties of the pendency of the action' . . . a potential litigant who knows about a legal proceeding usually has adequate notice." (quoting from *Mullane* [*v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)] *supra*); *In re Marino,* 195 B.R. 886, 893 (Bankr. N.D. Ill. 1996) ("a creditor who knows of the proceeding but has not received formal notice should be prevented from standing back and allowing the bankruptcy action to proceed."). 249 Fed. R. Evid. 803(3).

[15] Plaintiffs' Exhibit 105, Tab 9.

charging attorneys fees in the objection to the plan.[16] In some cases in which an objection was filed, the attorneys fee was eliminated as part of an agreement as to the value of the vehicle. That agreement was memorialized by a consent order or an announcement on the record. It is possible some proofs of claim filed by Lyons contained a postpetition attorneys fee but did not disclose it.[17] In fact, some of the proofs of claim included attorney's fees based on the Chrysler contract that allowed fees to be charged as a percent of the unpaid balance. He was never paid more than $320, however; he used the number merely as a negotiating tool.

Michigan – Darrell Chimko of Shermeta, Chimko & Adams represented Chrysler for the last eight years in the Eastern and Western Districts of Michigan. His firm receives a $250 flat fee for cradle to grave services in each case.[18] In the Eastern District of Michigan-Detroit, the trustee directs that the total amount of the claim be placed in Box 4. The creditor then attaches a sheet that includes only the amount of the claim without attorneys fees. He requests attorneys fees only in a situation where Chrysler is oversecured. Sometimes he lists "attorneys fees" on the face of the proof of claim.[19] However, he tries to do whatever the trustee requires. According to Chimko, any Michigan attorney knows "attorneys fees" claimed on a proof of claim form are postpetition fees.

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[16] Plaintiffs' Exhibit 37.

[17] Plaintiffs' Exhibit 113, Tab 14, claims 2 and 4.

[18] This fee has decreased from $350 to $325 to $250 over the years.

[19] Plaintiff's Exhibit 104, vol. 4 and 5.

Kentucky and Indiana – Allen Morris of Stites and Harbison represented Chrysler personally from 1993 or 1994 to 1996 and his firm represented it before that. He handled Chrysler work on a flat fee basis of $190-210 in the Southern District of Indiana (New Albany) and the Western District of Kentucky (Louisville). In all other divisions and districts, the fee was higher due to travel. His flat fee only covered work up to confirmation of a plan. The attorneys fee is included in the proof of claim as "plus attorneys fee and interest." The fee is added to all claims in which Chrysler believes it is oversecured. A debtor would know the fee is a postpetition fee because the box in item 5 is not checked on the proof of claim and the attachment that his firm did for proofs of claim showed it.[20] Some claims did not list the attorneys fee on the face of the claim, only in the attachment.[21]

Illinois – James S. Cole of the Riezman & Blitz firm has represented Chrysler in all three districts in Illinois from 1993 to present and since mid-2001 also in Missouri, Iowa, Kansas, Nebraska, Minnesota, Wisconsin, North Dakota and South Dakota. He charges a flat fee of $300 for cradle to grave services in Illinois cases and $288 for Missouri cases. His firm files proofs of claim requesting attorneys fees if Chrysler is oversecured or there is a co-debtor. His firm also includes fees when a debtor files bankruptcy very shortly after purchasing a car. For many years, Cole indicated attorneys fees were added only in an attachment to the proof of claim. Now his firm states

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[20] Plaintiff's Exhibit 104, vol. 8, Tab 13, #103360, 103354, 103383.

[21] Plaintiff's Exhibit 104, vol. 8, tab 13, #103357.

"attorneys fees" on the face of the claim too.[22] Since his firm cannot be in each location, they hire local counsel for individual appearances and pay them per appearance.

Alabama, Mississippi and Louisiana – Ms. Deidre Cherry and Ms. Robin DeLeo testified about the Dreher, Langer & Tomkies firm's representation of Chrysler in Alabama, Mississippi and Louisiana. Ms. DeLeo at the Dreher firm and at her previous firm represented Chrysler from June 1996 to June 2001. Ms. Cherry, of counsel to the Dreher firm, assisted in that work. Their policy was to charge postpetition attorneys fees to the debtor if Chrysler was oversecured. The claim was placed on the proof of claim form in box 5[23] as "includes $225 of attys fees" or "includes attys fees of $225."[24] At some point after the commencement of this suit, the Dreher firm started placing "includes $225 of *postpetition* attys fees" (emphasis added) on the form in the Southern District of Alabama only. Each claim form had a Chrysler computer screen attached which showed the prepetition balance owed on the account (until 1998) or, after that, a form that stated what principal, interest, and attorneys fees were owed. Ms. Cherry, as required by Ms. DeLeo, sent letters to debtors' counsel when Chrysler's treatment in a plan was inadequate. The letters always made reference to the $225 attorneys fee. Ms. Cherry generally had a follow up call

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[22] Plaintiff's Exhibit 104, vol. 7, tab 11.

[23] It was placed in Box 5 at least from 1998 to 2001.

[24] The flat fee that the Dreher, Langer firm was paid for Alabama cases was $275, but for consistency sake, the firm only requested a $225 fee in proofs of claim.

with each debtor's attorney in which she mentioned the fee.

Generally, paralegals in the firm signed the proofs of claim with Ms. DeLeo's signature after 1998. Before that, paralegals signed the proofs of claim in their own names. The change occurred because questions about claims were always directed to the signer of the form and Ms. DeLeo wanted all questions to come to her. In the relief from stay order in Powe that reiterated that a $225 attorneys fee was charged for all services in a case, including the motion for relief from stay, the order was drafted as it was to insure that it was clear the only attorneys fee being charged to Powe was $225. Local counsel were paid by the Dreher firm itself, not Chrysler, if local counsel was necessary.

California – Roger Efremsky, an attorney at Efremsky & Nagel in California, has represented Chrysler since February or March 1996 in the Northern and Eastern Districts of California as second tier counsel under the Cooksey & Cooksey firm. He has a direct relationship with Chrysler but his fees are paid through the Cooksey firm. The present cradle to grave fee he charges is $400. His policy is to include attorneys fees in proofs of claim if Chrysler is oversecured and he has to file an objection to the plan, a motion for relief from stay or a motion to assume (if the debtor has a lease). In all cases, any fees Efremsky includes are specifically approved in a court order of some type. He has only included an attorneys fee in a proof of claim in 63 of approximately 780 chapter 13 cases he has handled since 1996.

CHRYSLER ATTORNEY PRACTICES FROM VIEWPOINT OF DEBTORS' COUNSEL AND CHAPTER 13 TRUSTEE

Four chapter 13 debtor lawyers testified in this case, Eric Schwab of Sacramento, California, and Irvin Grodsky, Melissa Wetzel and Larson Edge of Mobile, Alabama, Schwab reviews all secured and priority proofs of claim filed in his cases. He is aware that Richard Efremsky sometimes charges postpetition attorneys fees when Chrysler is oversecured. The fees are approved in court orders. He believes a flat fee charge by attorneys for creditors like Chrysler is fair and cheaper than "a la carte" fees. His own fee is a set amount as well that can be subject to increase.

Irvin Grodsky, Larson Edge and Melissa Wetzel do not review all proofs of claim. They do not have the time due to the size of their practices. It has never been the standard procedure in this district. Grodsky does not object to the concept of a flat fee as long as there is disclosure. If the chapter 13 office alerted Grodsky that a claim might be defective, he would look at it carefully. He also relies on his knowledge of how attorneys in this court practice and what they typically do. Once he did examine Chrysler's proof of claim in the Powe case, he would never have thought it included an attorneys fee. Edge does not usually review proofs of claim when they are received. Wetzel handles the mail and reviews any claims received. As far as the claim in Moore's case, he cannot tell if the fee included is pre- or postpetition and he did not have a practice of calling creditors' counsel about such fees before this suit. He does now. Edge believes $225 is a reasonable fee for this case in light of the relief from stay motion filed. He thought that the fee was for prepetition work. Wetzel

does not recall seeing the Chrysler proof of claim in the Moore case, but if she did, she would have assumed it was a prepetition fee.

The chapter 13 trustee from Sacramento, California and Reno, Nevada testified. He assumes that fees shown in a proof of claim are prepetition fees if not otherwise specified due to the timing of filing of the petition and proof of claim. He does not find flat fees to be unreasonable per se, and in fact believes they can be beneficial to debtors since hourly charges are usually higher. Mr. Johnson believes fee disclosures can be made other than in a proof of claim such as in letters and a stipulation between counsel. However, bankruptcy judges are more interested in reviewing postpetition fees than prepetition. Johnson also would object to a flat fee charged by a creditor that included a fee for filing a relief from stay motion if the fee request was made before the motion was filed.

LAW

There are six motions pending in this case that require a ruling in conjunction with this final judgment. They are:

1. Chrysler's motion to dismiss, as moot, the claims of plaintiff Michael F. Powe and to dismiss the class claims for injunctive relief (docket entry no. 181).

2. Chrysler's motion in limine (docket entry no. 182) – (denied orally on record with findings and conclusions to follow).

3. Chrysler's motion for judgment to be entered in favor of defendant and against plaintiffs

and class members after the conclusion of the plaintiffs' evidence (docket entry no. 186).

4. Chrysler's motion for judgment to be entered in favor of defendant and against plaintiffs and class members after the conclusion of all evidence, or in the alternative, should this Court rule in favor of plaintiffs and class members and against CFC, motion to allow CFC to amend its proofs of claim (docket entry no. 187).

5. Chrysler's motion for decertification of class, or in the alternative, for amendment of the Court's class action order to limit the class to this district (docket entry no. 188).

6. Chrysler's motion to require plaintiff to propose a plan for class notice (docket entry no. 177).

There are several other issues pending: the Court's ruling on Chrysler's objections to plaintiffs' exhibits 110 and 111 and Chrysler's oral motion at trial to narrow class to exclude closed cases, cases outside two-year statute of limitations and cases with arbitration clauses. The Court will address each of these matters.

A.

Chrysler's Motion to Dismiss, as Moot, the Claims of Michael F. Powe and to Dismiss the Class Claims for Injunctive Relief

Chrysler moves for dismissal of Powe's claims because his vehicle was repossessed on December 6, 2001, and he will never pay the $225 attorneys fee included in Chrysler's proof of claim. Powe therefore has no standing to sue

Chrysler. The motion also alleges that Moore voluntarily paid its claim, including the $225 attorneys fee and her case is closed. Moore therefore has no standing to sue. Since both class representatives at the time of trial lacked standing, the case should be dismissed.

Powe and Moore assert that even if their claims are moot, the mootness occurred after certification and should not dictate that the case be dismissed. The mootness of their claims resulted from the length of time this case has taken to resolve.

The Court concludes that Powe and Moore's situation is similar to the situation of Claude and Terry Nolerto in their class action case against NationsBanc Mortgage Corporation. The Nolettos' case was converted to chapter 7 after the case was filed and NationsBanc Mortgage Corporation argued that the case should be dismissed due to mootness. The Court concluded that dismissal was not appropriate.

> [M]ootness should not bar a case when the Court has taken a long period of time to determine whether class certification is appropriate. *Groves v. Walton County Bd. of Education,* 686 F.2d 1135 (5th Cir. 1982); *Comer v. Cisneros,* 37 F.3d 775 (2d Cir. 1995). In this [the Noletto] case, at the time was [sic] case was filed, the Nolettos were in chapter 13 and were proper plaintiffs . . . The Court delayed the certification hearing to deal with jurisdictional issues and to allow discovery. Other cases focus on whether the plaintiff's claim was a viable one when the plaintiff moved for class certification. *Holmes v. Pension Plan of Bethlehem Steel Corp.,* 213 F.3d 124 (3d Cir. 2000). The Nolettos moved for class certification at the filing of this case. Their claim was a viable

> one then and was only mooted later. Other cases discuss mootness which may occur when the harm dissipates during the normal time required for resolution of the controversy, i.e., trial and appeals. *Sisna v. Iowa,* 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975) . . . The U.S. Supreme Court has held that a plaintiff whose claim is mooted "due to an occurrence other than a judgment on the merits[ ]" . . . does not lose his right to press the class certification claim. *U.S. Parole Commission v. Geraghty,* 445 U.S. 388, 402, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

Noletto v. NationsBanc Mortgage Corp., Case No. 98-13813-MAM-13, Adv. No. 99-1120, order granting class certification motion (Bankr. S.D. Ala. Dec. 29, 2000).

Powe and Moore's claims are like Noletto's claim. They became moot after the filing of the case and after class certification. Therefore, the case remains viable. As to Powe individually, his claim became moot involuntarily. His auto was repossessed when he could not make payments. Moore's claim is not moot. She paid the attorneys fee at issue. She is due a refund of the fee if the Court grants judgment to plaintiffs. Her payment was involuntary in the sense that she had no choice but to pay to receive her discharge. This action remains pending as her request for consideration of allowance of Chrysler's claim.

The fact that a case was closed does not extinguish bankruptcy court jurisdiction. The Court incorporates its rulings in *Slick v. Norwest Mortgage, Inc. (In re Slick)* and *Dean v. First Union Mortgage Corp. (In re Dean)* on this issue. *Slick v. Norwest Mortgage, Inc. (In re Slick),* Order Awarding Judgment to Plaintiffs, Adv. No. 99-1136, Case No. 98-14378 (Bankr. S.D. Ala. May 10, 2002); *Dean v.*

First Union Mortgage Corporation (In re Dean), Order Awarding Judgment to Plaintiffs, Adv. No 99-1144, Case No 00-11321-MAM-13 (Bankr. S.D. Ala. May 10, 2002).

Finally, to the extent either or both of Powe's and Moore's cases are moot, the Court would grant plaintiff's leave to appoint another class representative. There are other appropriate members of the class.

B.

Chrysler's Motion in Limine

The Court has already denied this motion orally on the record. Chrysler asserted that the Court should exclude from the record any evidence of the unreasonableness of Chrysler's attorneys fees for the reasons listed in its motion and any evidence as to punitive damages. The plaintiffs asserted that the Court had indicated that the unreasonableness of fees would be at issue in its June 1 and July 27, 2001 orders. Plaintiffs argue that a remedy – punitive damages – cannot be excluded from consideration by a motion in limine. Such a motion's purpose is to limit evidence only.

The Court concluded that the motion was due to be denied because the issue of the reasonableness of the fees had been raised by the plaintiffs and the Court had indicated on its rulings of June 1 and July 27, 2001 that evidence of the propriety of any specific fee could be addressed at trial. The Court concluded that preclusion of a remedy was not properly addressed in a motion in limine. Only evidentiary issues can be covered. *E.g., Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.,* 2001 WL 1673258 (C.D. Cal. 2001) *(dicta).* There are cases that do preclude remedies through a motion in limine

however. *The Cayuga Indian Nation of New York v. The Seneca-Cayuga Tribe of Oklahoma,* 1999 WL 509442 (N.D.N.Y. 1999); *Dalton v. Wal-Mart Stores, Inc.,* 1996 WL 435146 (D.N.[H.] 1996). This Court recognizes the existence of this case law but disagrees with it. In any event, the Court concluded that the reasonableness of fees was a proper issue for the Court.

C.

Chrysler's Motion for Judgment to be Entered in Favor of Defendant and Against Plaintiffs and Class Members After the Conclusion of Plaintiffs' Evidence

Chrysler alleges that plaintiffs' evidence does not sustain their burden of proving there is a class to whom relief should be granted. Resolution of this motion necessarily entails the Court's review of the evidence in plaintiffs' case and the application of the law to it. The Court's reasoning as to this motion is below. For the reasons stated below, this motion is denied.

D.

Chrysler's Motion for Judgment at the Conclusion of All Evidence

Chrysler alleges that plaintiffs did not sustain their burden of proof when the evidence is viewed after completion of trial. Resolution of this motion necessarily entails the Court's review of all of the evidence and the application of the law to it. For the reasons stated in the subparts below, this motion is granted.

E.

Chrysler's Motion for Decertification of the Class, or in the Alternative, For Amendment of the Court's Class Action Order to Limit the Class to This District

Chrysler asserts that the class certified by this Court on July 27, 2001 should be decertified because this Court has no jurisdiction over the case; there is no commonality or typicality among class members; this is not properly a Rule 23(b)(2) case; many of the class members have arbitration agreements in their contracts; and no notice has been given to class members. Resolution of this motion necessarily entails the Court's review of the evidence and the application of the law to it. For the reasons stated below, the motion is granted to the extent of limiting the class to debtors in the Southern District of Alabama as to the reasonableness of a specific fee.

F.

Chrysler's Motion to Require Plaintiff (sic) to Propose a Plan for Class Notice

Chrysler asserts that the plaintiffs should be required to give notice to class members in this case. First, Chrysler asserts, although the class was certified as a Rule 23(b)(2) class, it is really a Rule 23(b)(3) class and therefore notice is required. Second, notice is necessary when the class representatives' interests are different than the other class members. Since Powe and Moore have claims in which injunctive relief is not appropriate and, as to Powe, no damages are appropriate, many other class members' claims are distinct from the class representatives' claims. Third, proposed amendments to Rule 23(b)(2) would require notice to class members. Fourth, Chrysler wants

notice given to insure that all class members are bound by the judgment due to res judicata. Plaintiffs assert that the Rule 23(b)(2) classification is proper as explained in this Court's prior rulings. The main relief sought is injunctive.

The Court is not inclined to revisit its certification issue now. Since the trial was held, the issue is essentially moot anyway. Also, the Court concludes, upon review of its earlier opinions, that Rule 23(b)(2) certification was proper for the reasons stated in the opinions which are incorporated by reference. *In re Noletto,* Case No. 98-13813, Adv. No. 99-1120, order granting class certification motion (Bankr. S.D. Ala. December 29, 2000); *In re Sheffield,* Case No. 97-10511, Adv. No. 99-1124, order granting class certification motion (Bankr. S.D. Ala. December 29, 2000); *In re Slick,* Case No. 98-14378, Adv. No. 99-1136, order granting class certification motion (Bankr. S.D. Ala. December 29, 2000); *In re Miller,* Case No. 97-12807, Adv. No. 99-1137, order granting class certification motion (Bankr. S.D. Ala. December 29, 2000); *In re Powe,* Case No. 98-10935, Adv. No. 99-1121, order granting class certification motion (Bankr. S.D. Ala. June 1, 2001).

G.

Trial Issues

There were numerous issues raised in the trial of this case. Chrysler's relationship to its debtors varied from that of the mortgage lender creditors' relationship to their debtors described in two other opinions that the Court is issuing contemporaneously with this one. *Slick v. Norwest Mortgage, Inc. (In re Slick),* Adv. No. 99-1136, Case No. 98-14378-MAM-13, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala. May 10, 2000); *Dean v. First Union*

Mortgage Corp. (In re Dean), Adv. No. 99-1144, Case No. 96-14029-MAM-13, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala. May 10, 2000). In those cases the Court is awarding judgment for the classes. Chrysler's situation differs in several important respects. First, Chrysler's entire claim is being paid through the chapter 13 plan or is being discharged.[25] Second, Chrysler's attorneys disclosed that attorneys fees are being charged by indicating that fact on the proofs of claim.

Two evidentiary objections were taken under advisement by the Court in conjunction with the trial of this case. Chrysler objected to admission of plaintiffs' Exhibits 110 and 111. Exhibit 110 was a draft of the expert witness report of Jan Johnson, the Chapter 13 trustee from the Eastern District of California. Exhibit 111 was a draft of the report of Alex Gray, an attorney that represented Chrysler in Mobile in the Powe case. The Court concludes the documents are relevant and they are admitted. Even if the Court excludes them from evidence, the outcome of the case remains the same.

There are ten issues that need to be addressed in this ruling. They are:

1. Jurisdiction
2. Adequacy of disclosure
3. Reasonableness of fees

[25] In several cases in 2002 not involving Chrysler, the Court has seen auto loans of six or seven years. These loans are like mortgage loans in that they survive the life of the plan and are paid directly to the creditor, except for arrearages.

4. Reconsideration of claims
5. Amendment of claims
6. Standing of Powe and Moore
7. Private rights of action under § 105
8. Class decertification
9. Arbitration clauses
10. Incentive fees

1.

Jurisdiction

Chrysler asserts that this Court does not have jurisdiction to hear this case. For the reasons stated in *In re Noletto,* 244 B.R. 845 (Bankr. S.D. Ala. 2000), the Court concludes that it does have jurisdiction. The U.S. District Court of the Northern District of Alabama has recently issued a thoughtful opinion concluding that its bankruptcy court also has jurisdiction to consider a class action suit. *Bank United v. Manley (In re Manley),* Case No. CV-00-N-2141-W [273 B.R. 229 (N.D. Ala. 2001)], opinion dated November 29, 2001. This Court adopts its reasoning as well. This Court concludes that there is clearly no obstacle to this Court ruling on issues involving debtors in this district. The defendant does not dispute this exercise. It is debtors' cases beyond this district as to which a question has been raised. As to those cases, the District Court certainly has jurisdiction if this Court does not. If this Court is held to be without jurisdiction over this case, the Court reports and recommends to the District Court that it adopt these findings and conclusions pursuant to Fed. R. Bankr. P. 9033.

2.

Adequacy of Disclosure

Bankruptcy Code Section 506(b) states:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

The plaintiffs assert that secured creditors must file applications seeking approval of any fees sought under this section. Otherwise, without such an application and a court order specifically approving the fees, the fees cannot be charged to the debtor. Chrysler asserts no application and no specific disclosure is necessary.

The Court has ruled in other cases that some disclosure of a postpetition/preconfirmation fee is required. *Slick v. Norwest Mortgage, Inc. (In re Slick),* Order Awarding Judgment to Plaintiffs, Case No. 98-14378, Adv. No. 99-1136 (Bankr. S.D. Ala. May 10, 2002); *Dean v. First Union Mortgage Corp. (In re Dean),* Order Awarding Judgment to Plaintiffs, Case No. 00-11321 and 96-14029, Adv. No. 99-1144 (Bankr. S.D. Ala. May 10, 2002). In prior rulings in similar cases, the Court has ruled that postpetition/preconfirmation attorneys fees must be included in a creditor's proof of claim or an application for compensation or the fees cannot be collected from a debtor and are discharged. *Id.*

This case is different from the *Slick* and *Dean* cases cited above. In those cases, the creditor, a mortgage lender,

did not disclose a fee at all. In *Slick,* the fees were not even added to the mortgage balance reflected in the proof of claim. In *Dean,* the Court believes that the fees were added to the balance owed but in no manner separately itemized. In this case, Chrysler's attorneys did disclose the attorneys fees charged in varying ways. What manner of disclosure is adequate?

As stated in other opinions incorporated in this one by reference, the reason postpetition/preconfirmation fees need to be disclosed and added to the proof of claim is that debtors have a right to cure all preconfirmation arrearages, costs and fees through payments in their chapter 13 plans. *See Rake v. Wade,* 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993); *Telfair v. First Union Mortgage Corp.,* 215 F.3d 1333 (11th Cir. 2000); *Slick v. Norwest Mortgage, Inc. (In re Slick),* Order Awarding Judgment to Plaintiffs, Case No. 98-14378, Adv. No. 99-1136 (Bankr. S.D. Ala. May 10, 2002); *Dean v. First Union Mortgage Corp. (In re Dean),* Order Awarding Judgment to Plaintiffs, Case No. 00-11321 and 96-14029, Adv. No. 99-1144 (Bankr. S.D. Ala. May 10, 2002). Debtors should be able to fully pay all costs during the bankruptcy so that, postdischarge, they are completely current on their obligations or have fully paid debts to be satisfied during the bankruptcy case.

Fees to be charged to debtors as part of a secured creditor's claim in a case are to be "reasonable." 11 U.S.C. § 506(b). A debtor needs to be able to discern if the fees he is paying are reasonable. Unless a debtor has notice of the fees, he cannot make that determination.

When this case was commenced, the Court believed that the reasonableness standard for judging pre- and

postpetition attorneys fees might be different. Prepetition fees were "reasonable" for § 506(b) purposes if reasonable under state law and/or allowed by the parties' contract. Bankruptcy court scrutiny of those fees was more limited. *See, e.g., In re Carey,* 8 B.R. 1000 (Bankr. S.D. Cal. 1981); *In re Schriock Constr., Inc.,* 176 B.R. 176 (Bankr. D.N.D. 1994), *rev'd* 104 F.3d 200 (8th Cir. 1997). On December 17, 2001, the Eleventh Circuit Court of Appeals issued an en banc decision that held that the reasonableness standard for pre- and postpetition fees is the same. *Welzel v. Advocate Realty Investments, Inc. (In re Welzel),* 275 F.3d 1308 (11th Cir. 2001). Pre-*Welzel,* a disclosure that a fee was pre- or postpetition made a difference in the scrutiny a debtor and his attorney might apply to that fee. *Welzel* leveled the standard in this circuit and concluded that four other circuits had ruled similarly. *First W. Bank & Trust v. Drewes (In re Schriock Constr., Inc.),* 104 F.3d 200 (8th Cir. 1997); *Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc. (In re Hudson Shipbuilders, Inc.),* 794 F.2d 1051 (5th Cir. 1986); *In re 268 Ltd.,* 789 F.2d 674 (9th Cir. 1986); *Unsecured Creditors' Comm. 82-00261C-11A v. Walter E. Heller & Co. S.E., Inc. (In re K.H. Stephenson Supply Co.),* 768 F.2d 580 (4th Cir. 1985).

Therefore, whereas Powe and his counsel might have objected to hourly rates or types of service rendered or time expended when the fee was postpetition, but not prepetition, that dichotomy has been ruled baseless in *Welzel.* Therefore, if a creditor discloses that an attorneys fee has been charged regardless of whether Chrysler discloses the fee is prepetition or postpetition, that disclosure is sufficient because the review will be the same. Therefore, the Court's concern is that there is sufficient notice and description of all fees to put a debtor and all

other interested parties on notice that a fee has been charged and a review may be warranted.

Chrysler's attorneys, to the extent the Court could determine from the evidence, always stated at least that an "attorneys fee" was being charged if Chrysler was oversecured or otherwise entitled to a fee. The attorney may not have indicated clearly that the fee was pre- or postpetition but the fact that a fee was disclosed is sufficient according to *Welzel.* There may have been instances where a fee was charged to a debtor but not disclosed. However, the plaintiffs bore the burden of proving that was the case and the Court has no concrete evidence of nondisclosure. The attorneys who testified all indicated that a fee was only charged when Chrysler was oversecured or there was a co-debtor. No proof of claim indicated otherwise. At most, from the Court's review of the evidence, nondisclosure is a very infrequent event, if it happened at all.

3.

Reasonableness of Fees

If the fees were adequately disclosed as the Court is ruling they were, the only way the fees would not be payable is if they are unreasonable per 11 U.S.C. § 506(D) or are postconfirmation fees. *Telfair v. First Union Mortgage Corp.,* 224 B.R. 243 (Bankr. S.D. Ga.) *aff'd,* 231 F.3d 1333 (11th Cir.), *cert. denied,* 531 U.S. 1073 (2001). Plaintiffs assert that the fees are unreasonable on several grounds. Attorneys are not necessary to file proofs of claim at all and there should be no attorneys fee for ministerial services. The flat fees charged may overcompensate Chrysler in some cases. Flat fees are per se unreasonable.

Also, the flat fee includes charges for postconfirmation work. Chrysler asserts that the reasonableness of the fees is not one of the issues certified for class status. Furthermore, the fees are reasonable. Chrysler also asserts that reasonability is a determination each bankruptcy court should make itself based upon the particular facts of each case in question. Once a reasonableness determination is necessary all commonality of the class certified in this case is gone and no class ruling is appropriate except for debtors in this district.

The Court concludes that all of the issues plaintiffs raise about Chrysler's fees do raise issues personal to each case or district that make a blanket ruling by one court impossible. Once the nondisclosure hurdle is jumped, one court cannot deal with the variations among courts and regions. Unlike the cases in which there was no disclosure of fees to debtors, this case raises issues of prevailing local rates charged by attorneys, work required by chapter 13 trustees preconfirmation, breakdown of flat fees between pre- and postconfirmation work, allowance of additional fees for relief from stay, and motions and other local legal culture issues. As Chrysler evidence showed, courts have unique ways of processing chapter 13 cases that are geared to the particular district. Size of district and docket, number of trustees, computer systems and prior judicial ruling all influence how chapter 13 claims are handled. This Court cannot impose a cookie cutter fee structure on all districts for this reason. Upon hearing the evidence, the Court concludes that there is insufficient commonality to maintain a class as to what is an appropriate fee except as to debtors in this district.

As to fees in this district, the Southern District of Alabama, the evidence presented showed that a $225 flat

fee is charged for all work done on Chrysler's behalf in a chapter 13 case in this district. The charge is imposed at the filing of the case. In some cases, Chrysler may need to do no more than file a proof of claim. In other cases, an objection to confirmation and/or a motion for relief from stay will be needed. Charging a flat fee of $225-275 is not inappropriate or unfair. *See In re Gerac[i],* 138 F.3d 314 (7th Cir. 1998) (debtors' attorneys fees set at a presumptively reasonable flat fee); *Schueler v. Roman Asphalt Corp.,* 827 F. Supp. 247 (S.D.N.Y. 1993); *In re H[a]ske[w],* 2001 WL 589043 (Bankr. D. Idaho 2001); *In re McMullen,* 273 B.R. 558 (Bankr. C.D. Illinois 2001). In fact, several witnesses opined that overall the flat fee resulted in reduced cost to debtors as evidenced by the falling fees over the past five years or more charged by Chrysler's outside counsel. When the fee is charged for all work, not just filing of a proof of claim, there is no question that it is a reasonable fee. In Powe and Moore's cases, relief from stay was necessary. A fee of $225-275 is reasonable for the stay motion alone. This Court allows a $350 fee in cases where there is no flat fee arrangement. The Court concludes the fees as charged in this district are reasonable.

As this case has proved, preparing and filing a proof of claim is not a simple task. In many instances legal issues need to be considered at that time. Is the creditor oversecured? Is there a co-debtor? What is the district's policy on the proper manner to file a proof of claim? Are there prepetition fees or costs and, if so, should some or all of them be added to the claim? The act of filing a proof of claim is not always a ministerial act. If a creditor does not intend to ever claim any fees or costs and wishes to only claim the prepetition principal balance and accrued interest, the preparation and filing of the claim might be

as ministerial and no counsel needed. In most situations, however, any attorney may properly be used to file a proof of claim if a reasonable fee is charged.

4.

Reconsideration of Claims

Plaintiffs (and the Court) have termed this adversary as a request for reconsideration of claims pursuant to 11 U.S.C. § 502(j) as to those class members whose claims have been allowed or dealt with in a confirmed chapter 13 plan. *In re Powe,* Case No. 98-10935, Adv. No. 99-1121, order denying debtor's motion to strike Chrysler's amended motion to strike, denying defendant's motion for summary judgment and granting debtor's motion for class certification (Bankr. S.D. Ala. June 1, 2001). Section 502(j) allows a claim to be reconsidered "for cause." *Id.* The reconsidered claim "may be allowed or disallowed according to the equities of the case." *Id.* Chrysler asserts that reconsideration is a remedy that should not be freely allowed, particularly if the reconsideration will prejudice Chrysler. Orders allowing claims and orders confirming plans should be accorded res judicata effect. *In re Justice Oaks II, Ltd.,* 898 F.2d 1544 (11th Cir. 1990). Since the Court is not disallowing any fee of Chrysler in this district to the extent it is a flat fee of $275 or less for all work in each chapter 13 case, there is no need for the Court to reconsider the claims and the plaintiffs' request for reconsideration is denied.

5.

Amendment to Claims

Chrysler asserts that if there is a deficiency in the proofs of claim it filed, it should be allowed to amend the claims. Since the Court is concluding that Chrysler's proofs of claim were appropriate as filed, there is no need to address this issue.

6.

Standing of Powe and Moore

This issue was addressed in Part A above. If Powe is not a party with standing due to his voluntary surrender of his vehicle without payment of any fee, the Court concludes that a substitute plaintiff as class representative should be allowed. The length of time this case pended before trial caused the mootness of his claim. Moore also was a proper class representative at the time of certification. Her claim was mooted by payment of her entire chapter 13 plan debt in full. This debt included Chrysler's secured claim and fees. As with Powe, the length of time this case has lasted caused this situation. In order to obtain a discharge, Moore had to pay all of her plan debt. Her claim is not mooted by this payment. She would still be owed a return of the fee if the Court had found the fee, or any part of it, to be disallowable.

7.

Private Right of Action Under Section 105

This Court has already ruled that a private right of action does exist under 11 U.S.C. § 105. *Bessette v. Avco*

Financial Services, Inc., 230 F.3d 439 (1st Cir. 2000); *In re Tate*, 253 B.R. 653 (Bankr. W.D.N.C. 2000)

8.

Class Decertification

Chrysler asks the Court to decertify the class it constituted on July 27, 2001. It asserts that Rule 23(b)(2) certification is improper, multidistrict certification is improper, the Rule 23(a) standards are not met, and there are other limitations on the class even if it was appropriately certified.

Based upon the evidence, the Court agrees that the multi-district class is inappropriate for the issue remaining after the *Welzel* decision – the reasonableness of fees charged. Since that is the sole remaining issue, the class lacks commonality. The amounts of the fees vary; the proof of claim forms vary; the confirmation process varies; the creditor's attorneys' practice vary. Commonality requires that "there are questions of law or fact common to the class." Fed. R. Bankr. P. 7023(a)(2). Other than as to proofs of claim filed in this district, there is no commonality among the class members. As to debtors in the Southern District of Alabama, the class requirements are met. The Court still concludes that a Rule 23(b)(2) class was appropriate. Although no relief is being accorded debtors in this district because the Court has concluded the fees are reasonable, the class will be bound by the result.

9.

Arbitration Clauses

Chrysler asserts that many of the loan agreements of debtors who are a part of the class of debtors in the Southern District of Alabama and nationwide were precluded from being members of any class due to arbitration agreements in their contracts. The Court does not need to reach this issue.

10.

Incentive Fees to Class Representatives

This issue is moot since there is no recovery for the class.

IT IS ORDERED that defendant, Chrysler Financial Corporation, L.L.C. is awarded a judgment with this Order. Chrysler is instructed to submit a judgment for the Court's signature within 30 days of this order.

Dated: May 10, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

MICHAEL F. POWE — Case No. 98-10935-MAM-13

Debtor

MICHAEL F. POWE

Plaintiff,

THERESA MOORE BALLARD, — Case No. 98-13377-WSS-13

Intervenor,

v. — Adv. No. 99-1121

CHRYSLER FINANCIAL CORP., L.L.C.

Defendant.

ORDER DEFINING CLASS CERTIFIED IN CASE

Steve Olen, Mobile, Alabama, Attorney for the Plaintiff

Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiff

Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiff

C. Lee Reeves, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

Rhonda L. Nelson, San Francisco, California, Attorney for Chrysler Financial Corp, LLC

E. Barry Johnson, Birmingham, Alabama, Attorney for Chrysler Financial Corp., LLC

This case is before the Court for entry of an order defining the class certified in this case. The Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is defining the class as follows:

> All bankruptcy debtors who have filed a Chapter 13 petition on or after January 1, 1994 (1) who had proofs of claim filed in their cases by Defendant Chrysler Financial that included attorneys fees in the total amount claimed but which (a) did not disclose postpetition fees at all, or (b) did not disclose them with sufficient specificity; (2) in whose cases Defendant Chrysler Financial did not file a specific application for these fees which was approved by the United States Bankruptcy Court; and (3) in all districts in which Chrysler Credit Corporation has not been sued in a class action suit which pertains to the issues raised in this suit.

The definition above closely follows the plaintiff's definition. Chrysler had requested the Court to substantially narrow the definition of class members and create two subclasses.

The Court is not narrowing the definition at this point. If a narrower definition is proved to be appropriate after trial, then the Court will so rule. Since the Court is certifying a class under Fed. R. Bankr. P. 7023(b)(2), there is no notice given at this stage to class members and a change in the definition at a later date will be acceptable. Manual for Complex Litigation (3d) (Federal Judicial Center, ed., 1995), 30.14 ("[G]reater precision is required

in (b)(3) actions than in those brought under . . . (b)(2).”). The plaintiff is not required to prove his case at the time of the determination of the class. Newberg on Class Actions (3d) § 7.27 p. 7-88. The plaintiff is entitled to try to prove what it has alleged – that Chrysler's fees violate 11 U.S.C. § 506(b) and/or are unreasonable or a violation of bankruptcy law. Plaintiff is entitled to a class which includes debtors from all states, except where Chrysler is or has been subject to suit on these same issues. If trial proof shows that certain states or districts should be excluded from some or all claims, that amendment will be made after trial. The Court believes it is premature based on affidavits or even case law from one bankruptcy judge and one district judge in one district in Tennessee and one district judge in one district in Kentucky to exclude any districts.

Secondly, the Court disagrees with Chrysler that Ms. Moore and Mr. Powe belong in separate subclasses. The same relief is asked to be afforded to both – a clearing of all records of the trustee and Chrysler of any indication that a debtor or former debtor owes Chrysler any attorneys fee for work performed for it during the bankruptcy of class members, or a determination of what, if any, fee is reasonable. If the determination is that some or all of the sum paid by Ms. Moore was improper, that sum will be ordered paid to her. The payment is incidental to the injunctive and/or declaratory relief she (and others like her) are entitled to receive. There is no conflict between the two plaintiffs and they do not need separate counsel.

THEREFORE, IT IS ORDERED that the class definition for the class of plaintiffs in this case is:

> All bankruptcy debtors who have filed a Chapter 13 petition on or after January 1, 1994 (1) who had proofs of claim filed in their cases by Defendant Chrysler Financial that included attorneys fees in the total amount claimed but which (a) did not disclose postpetition fees at all, or (b) did not disclose them with sufficient specificity; (2) in whose cases Defendant Chrysler Financial did not file a specific application for these fees which was approved by the United States Bankruptcy Court; and (3) in all districts in which Chrysler Credit Corporation has not been sued in a class action suit which pertains to the issues raised in this suit.

Dated: July 27, 2001

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

MICHAEL F. POWE

Debtor.

Case No.
98-10935 MAM-13

MICHAEL F. POWE

Plaintiff,

THERESA MOORE BALLARD,

Intervenor,

Case No.
98-13377-WSS-13

Adv. No.
99-1121

v.

CHRYSLER FINANCIAL CORP., L.L.C.

Defendant.

ORDER DENYING DEBTOR'S MOTION TO STRIKE CHRYSLER'S AMENDED MOTION TO STRIKE. DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEBTOR'S MOTION FOR CLASS CERTIFICATION

Steve Olen, Mobile, Alabama, Attorney for the Plaintiff

Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiff

Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiff

C. Lee Reeves, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

Rhonda L. Nelson, San Francisco, California, Attorney for Chrysler Financial Corp., L.L.C.

E. Barry Johnson, Birmingham, Alabama, Attorney for Chrysler Financial Corp., L.L.C.

This case is before the Court on four motions: (1) the Debtor's Motion to Strike Exhibits; (2) the Defendants Amended Motion to Strike Exhibits; (3) the Defendant's Motion for Summary Judgment; and (4) the Debtor's Motion for Class Certification. The Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the debtor's motion to strike the defendant's amended motion to strike and the defendant's motion for summary judgment. The Court is granting the debtor's motion for class certification.

FACTS

There are two plaintiffs in the case, Michael F. Powe and Theresa M. Moore Ballard. They both filed chapter 13 bankruptcy cases in the Southern District of Alabama and seek to be the class representatives for a nationwide class of debtors. They state that the class would include:

> All individuals who have filed a bankruptcy petition and against whom Defendant has claimed as part of the amount due it pursuant to a consumer loan a bankruptcy fee, bankruptcy attorneys fee, attorneys fee, or any other fee or charge, whether collected or not, which increases the amount claimed by Defendant to be due from an individual, which is assessed, directly or indirectly, after the filing of a bankruptcy petition, including those from which Defendant has filed a proof of claim, and which would not have been claimed absent the bankruptcy, including but not

> limited to any fee or charge for preparing or filing a proof of claim. The terms "bankruptcy fee," "bankruptcy attorneys fee," "attorneys fee" and "any other fee or charge" do not include any attorneys fee or reimbursement of costs for which Defendant has made specific application and/or motion (not a proof of claim or reaffirmation agreement) to the United States Bankruptcy Court and for which a specific order of the United States Bankruptcy Court approving or denying said fees has been entered.

For purposes of the summary judgment and class certification motions, the relevant facts of each case need to be stated.

Michael Powe

Michael Powe filed his chapter 13 case on March 12, 1998. He filed schedules and a plan with his petition. The schedules listed a debt to Chrysler Financial Corporation ("Chrysler") in the amount of $14,000 secured by a first lien on a 1994 Plymouth Grand Voyager. Powe's plan proposed to pay Chrysler's claim at $250 per month until $14,000 was paid.

On April 14, 1998, Chrysler filed a proof of claim in the case which had an attachment. The proof of claim stated that Chrysler's claim was $11,787.13 and that the claim was secured by a lien on a motor vehicle. The proof of claim form stated, in the box in which the creditor is to list the entire claim – $11,787.13 secured and "includes $225.00 atty. fee (handwritten)." In a spot designated for court use only, Chrysler included a statement, "Plus interest at contract rate of 11.25%." The form was signed by a paralegal in the Draper & Marquer law firm from

New Orleans, Louisiana. The computer printout attachment showed a balance due of $11,562.13. The form also included other information in a coded format.

On April 14, 1998, Chrysler also filed an objection to plan confirmation. Attached to the objection was a copy of the parties' contract and the proof of claim. The objection stated that the net amount due was $10,885.91.[1] The objection stated:

> As an oversecured creditor, Chrysler's proof of claim includes $225.00 in reasonable attorney fees to which Chrysler is entitled under both the terms of the Loan Documents and the Bankruptcy Code.

The objection also noted that the Powe vehicle was uninsured. The objection was served on Powe, his attorney and the trustee.

At confirmation, Powe and Chrysler settled the objection issue by changing the plan to pay Chrysler $14,580 over the life of the plan (or nearly that) at $250 per month. Powe's attorney and Chrysler's attorney signed a statement of value which stated that the parties agreed "the fair and reasonable retail value of the property (the van) . . . is $14580, which includes interest at the contract rate." With this statement, Chrysler withdrew its objection to the plan. The order confirming the plan dated September 9, 1998 reflects the agreement.

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[1] Chrysler explains the discrepancy between the proof of claim and the objection balances due as a credit for precomputed interest on the objection.

Chrysler has been paid monthly payments of $250 for some (not all) of the months of this case. The case remains open.

Chrysler does not add attorneys fees to Powe's account based upon the proof of claim or confirmation order. When it receives payments it credits them first to principal and interest. If payments to Chrysler exceed the principal and interest due on a loan, the payments are credited to a general fund called the "interest income account." Chrysler accepts whatever sums it is ordered to accept according to confirmed plans. It does not change its records to reflect bankruptcy actions. Payoff figures are determined from the chapter 13 trustee's records only.

In July 2000, Powe defaulted in payments under his plan and Chrysler filed a motion to lift the stay. At the hearing, the parties resolved the matter and the Court indicated a willingness to award attorneys fees to Chrysler for having to bring the motion. The Court ordered the parties to determine such a fee and put it in the order. The order submitted to the Court, after Mr. Grodsky's review, allowed fees of $225. The order stated that "Chrysler is hereby awarded its reasonable attorney's fee in the amount of $225.00, which is included in the Collateral Value set forth in Debtor's Amended Chapter 13 Plan, dated August 20, 1998."

Chrysler has paid the Draper & Marquer firm $275 for all of its services in this case (from "cradle to grave.")

Theresa Moore Ballard[2]

Moore filed her chapter 13 case on September 18, 1998. She filed schedules in which she listed her debt to Chrysler as $7,600 secured by a first lien on a 1994 Plymouth van. Her plan proposed to pay Chrysler $160 per month for 60 months.

Chrysler filed a proof of claim on October 19, 1998, which stated that Chrysler was owed $8,220 on its secured claim. The proof of claim indicated that it "includes attorney's fees of $225 and precomputed interest of 8.75." The claim form was filed by a paralegal in the office of Dreher, Langer & Tomkies of New Orleans, Louisiana.

No objection to Moore's plan was filed and it was confirmed on November 17, 1998. On March 22, 1999, Chrysler filed a motion for relief from stay based on Moore's failure to provide information about insurance coverage on her vehicle. The motion was denied based upon Moore maintaining insurance.

Moore got behind in her plan payments and Chrysler filed a second motion for relief from stay. It was denied when Moore caught up the entire arrearage. On January 18, 2001, Moore paid off her entire case and received a discharge. This pay off occurred after a meeting on that same day with her bankruptcy counsel and class action counsel about the possibility of Moore joining this suit. At pay off she was aware she was paying an attorney's fee

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[2] Theresa Moore Ballard was Theresa Moore throughout most of her case. She married around the time of the satisfaction of her Chrysler claim and plan. Since her file is labeled Theresa Moore, the Court will call her that in this opinion.

included in Chrysler's proof of claim. On January 19, 2001, she moved to intervene in this suit. Chrysler paid the Dreher firm a flat fee of $275 for all of its services in this case. Local counsel was paid $300 for two appearances at relief from stay hearings. The Dreher firm, not Chrysler, paid those fees.

ADDITIONAL FACTS

Chrysler employs various law firms across the country to act as its attorneys in bankruptcy cases. The attorneys charge different flat fees for their work on the cases, but the procedures followed by Chrysler are the same in all cases.

Chrysler does not change its records on any bankruptcy debtors' accounts except to note how the debt is to be paid in the plan and to note that the debtor is in bankruptcy. There is no recomputation of the debt or reamortization. In fact, Chrysler does not know if its attorneys are charging an attorneys fee in any case. If such a fee is collected, Chrysler's records never show it as an attorneys fee. It is credited to interest. Chrysler keeps track of payments received and credits them first to interest and then principal. Any chapter 13 debtor who wants to know the amount necessary to pay off Chrysler's loan in the chapter 13 case must get that information from the chapter 13 trustee. Chrysler does not have that figure. It relies totally on the chapter 13 trustee's accounting.

Chrysler's attorneys do not all follow the same procedures in completing proof of claim forms. Some, like in the Powe and Moore cases, list an "attorneys fee" on the form itself. Others do not reflect a fee at all. It is unclear at

present whether a fee is added in the cases which do not indicate a fee.

PROCEDURAL HISTORY

After the filing of the motion for summary judgment and the motion for class certification, each party filed a motion to strike certain documents submitted as bases for the motions.

The plaintiffs seek to have the supplemental affidavits of various witnesses excluded as having been filed after the date allowed by the scheduling order. The defendant seeks to strike Exhibits 103-108 of plaintiffs as being late, giving defendant no ability to respond.

LAW

The Court will address all four motions in turn commencing with the motions to strike, then turning to the motion for summary judgment and finally to the motion for class certification. However, as a preliminary matter the Court needs to state several things. This case is the sixth case filed before this judge by the same plaintiffs' counsel seeking certification of a class based on attorneys fees claimed by various creditors in chapter 13 cases. This case for various reasons is on a different schedule than the other five cases. The other five cases have already had motions for summary judgment denied and motions for class certification granted. *Slick v. Norwest Mortgage, Inc. (In re Slick),* Case No. 98-14378, Adv. No. 99-1136 (Bankr. S.D. Ala. order dated December 29, 2000 and March 6, 2001), *Noletto v. Nationsbanc Mortgage Corp. (In re Noletto),* Case No. 98-13813, Adv. No. 99-1120 (Bankr. S.D. Ala. Orders dated December 29, 2000 and February 8,

2001), *Sheffield v. Homeside Lending, Inc. (In re Sheffield),* Case No. 97-10511, Adv. No 99-1124 (Bankr. S.D. Ala. orders dated December 29, 2000 and March 6, 2001); *Miller v. First Union Bank (In re Miller),* Case No. 97-12807, Adv. No. 99-1137 (Bankr. S.D. Ala. orders dated December 29, 2000 and February 8, 2001); *Harris v. First Union Mortgage Corp. (In re Harris),* Case No 96-14029, Adv. No 99-1144 (Bankr. S.D. Ala. orders dated December 29, 2000 and February 8, 2001).

Each case of course presents different facts. This case is different from the other cases because the lender makes loans on personal property and not real estate. Chrysler's liens are typically paid off during the life of a plan and Chrysler's entire claim is included in the plan, unlike the real estate lenders. The real estate lenders are paid their prepetition and postpetition preconfirmation arrearages only through the plan. Regular monthly mortgage payments are paid outside the plan and continue after the five-year period of the plan.

The Court will not repeat the holdings of the prior four cases to the extent they are applicable to this case and will instead refer to those rulings. The Court will only specifically address issues that make this case peculiar.

Motions to Strike

Both the plaintiffs and defendant have filed motions to strike exhibits of the other. The plaintiffs seek to strike eight supplemental affidavits and other documents submitted on March 22, 2001. The supplemental materials were submitted after the deadline established in the parties' scheduling order. The defendant seeks to strike Exhibits 103-108 of plaintiffs which are different sortings

of proofs of claim produced in discovery by Chrysler to the plaintiffs or other documents concerning chapter 13 cases in this district. The claims are sorted by types of disclosures of attorneys fees in Exhibits 103-105. Exhibit 103 includes claims which are fully secured and no fee is disclosed. Exhibit 104 contains fully secured claims as to which an attorney fee is disclosed. Exhibit 105 is claims which are shown as undersecured. Exhibit 106 contains proofs of claim which the plaintiffs admit contain an adequate disclosure of attorneys fees. Exhibit 107 contains statements of value as to various vehicles as to which Chrysler filed a proof of claim. Exhibit 108 is a compilation of cases in this district in which debtors completed their plans.

The parties were prepared to submit further briefs or argument on these motions. The Court has determined that it is unnecessary. The Court has discretion to admit further evidence for purposes of a summary judgment motion or a class certification motion. The Court in its discretion can even reopen a case to admit evidence after the close of evidence. *Mathew Bender & Co., Inc. v. West Publ'g Co.,* 158 F.3d 674 (2d Cir. 1998) *cert. denied sub nom, West Publ'g Co. v. Hyperlaw, Inc.,* 526 U.S. 1154, 119 S. Ct. 2039, 143 L. Ed. 2d 1048 (1999); *United States v. Thetford,* 676 F.2d 170, 182 (5th Cir. 1982), *cert. denied,* 459 U.S. 1148, 103 S. Ct. 790, 74 L. Ed. 2d 996 (1983); *United States v. Faul,* 748 F.2d 1204 (8th cir. 1984); *United States v. McQuisten,* 795 F.2d 858, 864 (9th Cir. 1986); *City of Wichita, Kan. v. US. Gypsum Co.,* 72 F.3d 1491 (10th Cir. 1996). The issue is whether either side is unduly prejudiced or surprised by the additional evidence and whether the opposing party was precluded from having an adequate opportunity to meet the additional evidence. *See*

United States v. Faul, 748 F.2d at 1218 (citing *United States v. Webb,* 533 F.2d 391, 395 (8th Cir. 1976)); *United States v. Thetford,* 676 F.2d at 182.

The Court concludes it is appropriate to deny both motions to strike. As to the plaintiffs' motion, Chrysler's supplemental affidavits were offered after the deadline fixed by the scheduling order but, in light of the voluminous nature of the evidence and the recent opinions being issued by this Court and others that may change what is relevant, it is equitable to allow the admission of the exhibits. As to Chrysler's motion, the plaintiffs' exhibits are not new evidence, just a sorting of what Chrysler has produced to plaintiffs as to Exhibits 103-106. Exhibit 107 is also evidence produced to plaintiffs. Exhibit 108 states the results of certain cases in the Southern District of Alabama. The exhibit attempts to rebut some of the supplemental evidence the Court is allowing Chrysler to offer. Neither the plaintiffs nor Chrysler can really argue that either is very surprised by the other's additional evidence and each was given a chance to comment upon it at the hearing.

Chrysler Motion for Summary Judgment

The issue in all of the class actions in this Court to date has essentially been adequate notice. *See, e.g.*, summary judgment orders and rehearing orders in *Slick v. Norwest Mortgage, Inc. (In re Slick),* Case No. 98-14378, Adv. No. 99-1136 (Bankr. S.D. Ala. orders dated December 29, 2000 and March 6, 2001); *Noletto v. Nationsbanc Mortgage Corp. (In re Noletto),* Case No. 98-13813, Adv. No. 99-1120 (Bankr. S.D. Ala. orders dated December 29,

2000 and February 8, 2001); *Sheffield v. Homeside Lending, Inc. (In re Sheffield)*, Case No. 97-10511, Adv. No 99-1124 (Bankr. S.D. Ala. orders dated December 29, 2000 and March 6, 2001); *Miller v. First Union Bank (In re Miller)*, Case No. 97-12807, Adv. No. 99-1137 (Bankr. S.D. Ala. order dated December 29, 2000 and February 8, 2001); *Harris v. First Union Mortgage Corp. (In re Harris)*, Case No 96-14029, Adv. No 99-1144 (Bankr. S.D. Ala. orders dated December 29, 2000 and February 8, 2001). Has a creditor's proof of claim given the debtor, trustee and other interested parties who might review the claim sufficient notice of what is being claimed? The Court has stated that there is no one method required for creditors to seek payment of attorneys fees in chapter 13 cases. *Id.* Fee applications are appropriate and so are proofs of claim with fees requested as part of the claim. There may be other methods of seeking fee approval as well. The issue is whether the debtor, trustee and other parties in interest are on notice of and have the ability to determine whether an allowable fee is being requested.

A.

This is a motion for summary judgment filed by the defendant pursuant to Fed. R. Bankr. P. 7056. Rule 7056 states that the Court shall grant summary judgment to the moving party if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). The moving party bears the burden of proving that there is no issue of material fact. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or

weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson* at 249. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id.*; *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). All inferences are resolved in favor of the nonmoving party. *Stewart v. Booker T. Washington Ins.,* 232 F.3d 844 (11th Cir. 2000); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997).

B.

The Bankruptcy Code section at issue in this case is § 506(b). It states:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

The plaintiffs assert that Chrysler, like the secured lenders in the prior cases, must file applications seeking approval of any fees sought under this section. Chrysler asserts that no fee application is necessary.

According to the rationale of the U.S. Supreme Court case of *Rake v. Wade,* Chrysler has a right to seek payment of reasonable attorneys fees when it has an oversecured claim in a bankruptcy case. *Rake v. Wade,* 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993). The *Rake v.*

Wade case dealt with postpetition interest, not attorneys fees, but the reasoning is the same.

As with other bankruptcy claims in a chapter 13, the trustee can only pay the claims if they are filed with the court. In the Powe and Moore cases, Chrysler filed proofs of claim. Both claims indicated on the face that attorneys fees were being charged, although the pre- or postpetition nature of the fees was not disclosed. The plans of both Powe and Moore provided for the Chrysler debt in the plans. In each, Chrysler was to be paid its allowed secured claim in full over the life of the plan. Therefore, if Chrysler included an attorneys fee, which it did, it was to be paid as part of the payments the debtor made to the plan. The attorneys fees were "provided for" by the plans. *Rake v. Wade,* 508 U.S. at 473.

C.

What disclosure of the attorneys fee was required? Chrysler filed a proof of claim and included attorneys fees. The fees were disclosed as fees.[3] However, there was no further description. This description of the fees is not sufficiently specific.

In order to be paid, the fees must be claimed in a manner appropriate under the Bankruptcy Code and Rules and in a manner appropriate to fulfill due process concerns. The Bankruptcy Code, at § 503, contains a procedure for allowance of administrative expenses.

[3] At least in Powe and Moore's case the fees were identified as attorneys fees on the proof of claim. It is unclear whether attorneys fees charged in all cases were identified.

Administrative expenses are postpetition claims against the bankruptcy estate. Allowable administrative expenses are not just those listed in § 503(b). Pursuant to case law, they are expenses which benefit the estate.[4] *Burlington Northern Railroad Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.),* 853 F.2d 700 (9th Cir. 1988); *In re Mid-American Waste Systems, Inc.,* 228 B.R. 816, 821 (Bankr. D. Del. 1999). Section 503 expenses include compensation to professional persons approved by the Court and professionals employed by creditors whose services benefit the estate. 11 U.S.C. §§ 503(b)(2) and (b)(3)(A)-(D). The fees of a creditor that has a claim under § 506(b) are not like the claims allowed under § 503. Payment of a secured creditor's attorneys fees does not benefit the estate as a whole.

Section 502 establishes a procedure for allowance of prepetition claims and some postpetition claims. *See, e.g.,* 11 U.S.C. § 502(f), (g), (h) and (i). This section applies to all prepetition interest, fees and costs on a secured claim, if the secured creditor seeks to file a claim. There is a split of authority as to whether a postpetition attorneys fee claim

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[4] There is an Eleventh Circuit case, *Alabama Surface Mining Commission v. N.P. Mining Co., Inc. (In re N.P. Mining Co., Inc.),* 963 F.2d 1449 (11th Cir. 1992), that states an administrative expense need not have "[a] connection to some benefit to the estate." The Court found that administrative expenses include certain expenses that result from the ordinary operation of a business, even if they are not beneficial to the estate. The Court reasoned that trustees must operate an estate in compliance with state law. Otherwise a debtor could file bankruptcy and knowingly continue violating laws while avoiding the full penalties for those violations. Even if this Court were to extend its analysis to include as administrative expenses those that are ordinarily incident to the operation of a business, regardless of their benefit to the estate, the § 506(b) expenses at issue here still would not fall under § 503.

may constitute part of a creditor's prepetition claim. *In re Keaton,* 212 B.R. 587 (E.D. Tenn. 1997), *vacated on other grounds, Keaton v. Boatmen's Bank,* 145 F.3d 1331 (6th Cir. 1998); *In re Byrd,* 192 B.R. 917 (Bankr. E.D. Tenn. 1996); *contra In re Woodmere Investors Ltd. Partnership,* 178 B.R. 346 (Bankr. S.D. N.Y. 1995); *Sakowitz, Inc. v. Chase Bank Int'l (In re Sakowitz, Inc.),* 110 B.R. 268 (Bankr. S.D. Tex. 1989). However, whatever a claim is called – prepetition or postpetition – the procedure under § 502 does not address the issue of what disclosure is necessary if postpetition fees are being requested as part of a prepetition claim. Likewise, § 506(b) allows for postpetition attorneys fee claims but establishes no specific procedures to claim them.

Courts have simply not been asked to deal with the issue until recently in cases in this court and others around the country. *See, e.g., Tate v. NationsBanc Mortgage Corp. (In re Tate),* 253 B.R. 653 (Bankr. W.D.N.C. 2000); *Manley v. Bank United,* No. 99-70632, AP99-70084 (Bankr. N.D. Ala. June 30, 2000) (one of five pending class action cases under Judge C. Michael Stilson). The Court concludes that either filing an application for fees in compliance with § 503 and Rule 2016 or filing a proof of claim which specifically claims for postpetition fee is sufficient to comply with due process requirements for payment. Due process requires that the debtor not be "deprived of a protected interest without sufficient process." *New Concept Housing, Inc. v. Poindexter (In re New Concept Housing, Inc.),* 951 F.2d 932, 938 n.7 (8th Cir. 1991); *Zipperer v. City of Fort Myers,* 41 F.3d 619 (11th Cir. 1995). Notice must be given which is "reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an

opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Filing a fee application and filing a proof of claim both satisfy due process concerns or the procedures would not be the statutory and procedural means used for twenty years to deal with claims. In both situations, a debtor has an opportunity to object and be heard. The fact that the debtor must file the claim objection and bears the initial burden of proof if the creditor puts the fee in its proof of claim, and the creditor bears the burden of proof in a fee application does not change the fact that both afford the parties due process.

There is support in a well known bankruptcy treatise and in the Eleventh Circuit for the position that a claim for § 506(b) expenses on a proof of claim is sufficient. Collier on Bankruptcy, § 506.04[6] acknowledges the uncertainty with § 506(b) claims and states in a section entitled, "Filing of Proof of Claim Advisable":

> Technically speaking, the Code and Rules do not require the filing of a proof of claim with respect to postpetition interest, fees, costs and charges. At times, however, courts have appeared to assume otherwise. (footnotes omitted). Accordingly, any secured creditor intending to seek allowance of postpetition amounts under section 506(b) would be well advised to make that fact clearly known in its proof of claim.

Collier on Bankruptcy, 15th Edition, § 506.04[6], p. 506-121 (King, et al., ed. Matthew Bender & Co., 2000). The Eleventh Circuit acknowledged in *Fawcett v. U.S. (In re Fawcett),* 758 F.2d 588 (11th Cir. 1985), that a claim of postpetition interest under § 506(b) on a creditor's proof of

claim was sufficient notice of the claim to make the debtor liable for the interest in a chapter 13 case.

The Court therefore respectfully disagrees with *Tate v. NationsBanc Mortgage Corp. (In re Tate),* 253 B.R. 653 (Bankr. W.D.N.C. 2000). The requirement of a fee application in all cases is too narrow a holding. Section 503 and Fed. R. Bankr. P. 2016 do not cover secured creditors' fees any more clearly than § 502 and Fed. R. Bankr. P. 3001, 3002, 3003, and 3007 do. The key issue is notice. If sufficient notice of the claim is provided, the claim should be allowed unless, after objection by a party in interest, the court disallows the claim.

In this case, Chrysler's claim disclosed an "attorneys fee" or "atty fee" was being charged. Is this specific enough for notice purposes? Looking at the facts in the light most favorable to the nonmoving party, this Court concludes that without further disclosure of the nature and purpose of the fees, Powe and Moore do not have adequate notice that Chrysler is charging a fee for the preparation and filing of the proof of claim or other postpetition work on the bankruptcy case.

In the prior class action cases, the fee disclosure was inadequate unless it gave parties in interest notice of the pre- or postconfirmation nature of the fee because postconfirmation mortgage fees cannot be paid in a chapter 13 plan (at least without full disclosure and consent). *Telfair v. First Union Mortgage Corp.,* 216 F.3d 1333, 1339 (11th Cir. 2000). This case does not pose the same problem. *Any* fees Chrysler seeks to charge must be paid through the plan. A discharge will bar recovery of any other unclaimed fees unlike the mortgage cases in which the lien rides

through the plan undischarged together with postconfirmation fees. In this case, the problem with the disclosure is that Powe and Moore and other interested parties are not given notice of what the fees encompass. Is there a "future claim" element to the fee? Are Powe and Moore at the outset of their cases being charged for services that may not be required in their cases? The danger in claims of creditors like Chrysler in chapter 13 is the claims for "anticipated" fees. This is similar to the mortgage lender cases in that "anticipated" fees, i.e. fees for future as of yet unperformed services, are inappropriate in both cases. If performed postconfirmation, mortgage lenders may add them to the loan balance; auto lenders must file an additional or amended proof of claim.

Chrysler argues that its attorneys charge a flat fee for cradle to grave services and this should be allowable as a reasonable fee regardless of actual work performed. For summary judgment purposes, the Court concludes that there is a genuine issue of material fact as to the point. The debtors have shown that their cases required very different services. They also showed that paralegals performed a portion of the work on the files. In one case, the court without being aware of the flat fee arrangement awarded what she thought would be additional fees to Chrysler's counsel for a relief from stay matter. The facts, taken in the light most favorable to Powe and Moore, do not entitle Chrysler to summary judgment on this point. The fee disclosure is not clear; fees charged may not have been incurred yet and the fees may be unreasonable. Therefore, the facts present an issue of material fact.

D.

Chrysler asserts eight more reasons why summary judgment is appropriate. The Court will address each one in turn.

1.

Chrysler asserts that there is no private right of action under §§ 506(b) and 105. This issue was addressed in the *Sheffield v. Home Side Lending* opinion of December 29, 2000, in Part II. The Court concluded that a private right of action does exist under § 105 and incorporates and adopts the reasoning of the *Sheffield*, *Miller* and *Harris* cases here without restating them. The *Bessette v. Avco Financial Services, Inc.* case, 230 F.3d 439 (1st Cir. 2000) states the reasoning well.

2.

Chrysler states that the plaintiffs' assertions that Chrysler violated the automatic stay of § 362(a) are incorrect and summary judgment in its favor is appropriate. This Court already ruled in several other cases that filing a proof of claim that seeks fees from a debtor cannot violate the debtor's stay. *See, e.g., Sheffield,* summary judgment order of December 29, 2000, *Noletto,* summary judgment order of December 29, 2000, *Miller* summary judgment order of December 29, 2000, and *Harris* summary judgment order of December 29, 2000.

The issue raised by plaintiffs is not that the proof of claim filing violates the stay but that the posting and collection of the fee violates the stay. Powe and Moore allege that Chrysler uses the trustee's records as its

accounts and the attorneys fees claimed become part of Chrysler's account for each debtor when a proof of claim is filed. Powe and Moore also allege that each payment to Chrysler by the trustee under the plan includes a payment of a portion of any attorneys fee which has been included in the proof of claim. Chrysler asserts that it credits plan payments received from the trustee to principal and interest only. Any payments above principal owed are credited to an interest income account. Its position is that it never credits payments as attorneys fees. Further, since many plans (most Chrysler asserts) are dismissed before completion, no fees are even paid since at best they would be credited by Chrysler only at the very end of the loan.

Chrysler is correct that it can allocate payments from the debtor to it as it wishes unless the debtor has directed application. *See, e.g., Sumlin v. Hagan Storm Fence Co. of Mobile, Inc.,* 409 So.2d 818 (Ala. 1982); *W. L. Jones v. Frye and Anders Equipment Co.,* 102, 154 So.2d 47 (Ala.App.1963). Since the debtor cannot direct the trustee's payments except through the plan, the Court concludes that Chrysler can assert that attorneys fees are the very last amount paid by a debtor since the plans are silent. This means that there are a large number of cases pending where the fees are posted to Chrysler's account, but unpaid.

The posting, or even payment of the fees, in these cases does not violate the stay. Chrysler will collect any fees it posts solely from property of the estate, as it should. The problem for the mortgage lenders in the other cases is that they collect inappropriate fees through the plan (postconfirmation fees) or they post the postpetition/preconfirmation attorney fees debt to the claim balance to be paid outside the bankruptcy plan. The first

practice seeks to obtain property of the estate improperly; the second practice violates the discharge injunction. Since Chrysler must be paid though the plan and is only paid through the plan, there is no stay violation which requires the taking of property of the estate improperly.

3.

Chrysler alleges that an injunction is not appropriate in the Powe or Moore cases and therefore the suit should be dismissed. In the rulings in the *Sheffield* and *Noletto* cases, for instance, the Court ruled that injunctive relief was the primary relief to be granted to debtors because:

> All debtors have had the attorneys fees posted to their corporate advance accounts, but most of them have not paid the fees yet or have paid only part of them. Therefore, the major relief to be accorded them is to have the fee wiped off their account balances which is injunctive relief.

The same is true in the majority of the cases at issue with Chrysler. The attorneys fee has been added to the amount to be paid by the chapter 13 trustee. Chrysler treats the chapter 13 trustee's record as its account balance when a case is in bankruptcy. If, as Chrysler asserts and this Court has held, the fee is paid at the end of the chapter 13 case, if at all, all of the fee balance is on the debtor's account until the very last payments. Therefore, if the fees are inappropriate, the elimination of them from each debtor's chapter 13 case will be the major relief granted.

4.

Chrysler asserts that Powe and Moore's claims are barred by claim preclusion and res judicata. First, it alleges that confirmation of each debtor's plan precludes review. The Court disagrees for all of the reasons previously stated in the order in the *Sheffield* case. A claim can be reconsidered at any time under § 502(j). Claim reconsideration is a major exception to res judicata.

Second, in the Powe case, Chrysler asserts that the relief from stay order is res judicata as to the fee because the order specifically approved the fee. The Court concludes that this is incorrect. The Court awarded attorneys fees to counsel for Chrysler for bringing the motion for relief from stay. These fees were awarded solely for the motion. The Court never realized that Chrysler, in the order presented, included no new fees but asked the Court to approve fees in the proof of claim. To the extent this was what Chrysler thought its order did, it is incorrect because it was not the Court's intent. This Court signs many orders each week. The Court did not review the order presented in any great detail. To the Court, the order was not clearly meant to resolve issues in this class action case. The Court has the power to grant relief from orders it signs by mistake. Fed. R. Bankr.P. 9024. *See, e.g., Wetherbee v. Willow Lane, Inc. (In re Bestway Products, Inc.),* 151 B.R. 530 (Bankr. E.D. Cal. 1993). The Court, in this opinion, clarifies that the order was an award of new fees only and the order is amended if necessary to clarify this intent.

Since a claim can be reconsidered at any time and is an exception to the rule of finality of confirmation orders and the Court never intended to approve the proof of claim

attorneys fees in Powe's relief from stay order, summary judgment on grounds of res judicata or issue preclusion is denied.

5.

Chrysler asserts that Powe and Moore have no standing to assert the claims made in the complaint. As to Powe, Chrysler alleges that he has paid no attorneys fees to date because his plan is not completed. As stated above, the claim is "posted" to his account with the chapter 13 trustee. This alone is sufficient to give him standing. Chrysler also alleges that only the chapter 13 trustee or other creditors can bring the suit. Powe, as debtor, can always seek reconsideration of Chrysler's claim under § 502(j) and he has standing anyway as stated above.

Moore has paid the fees in full in order to pay off her plan. However, this suit was pending when she paid the claim and she is a class member. This suit constitutes an objection to the claim or a request for reconsideration which she did not waive at payoff. Waiver is the "intentional abandonment or relinquishment of a known right" which was not present in this case. *See, e.g., In re Rovell,* 2000 WL 236368, (Bankr. N.D. Ill. 2000) quoting *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.,* 907 3d 1264 (7th Cir. 1996); *Dooley v. Weil (In re Garfinkle),* 672 F.2d 1340 (11th Cir. 1982). Ms. Moore paid the sums knowing the class action was already pending to protect her rights.

The *Rovell* case concluded that a final confirmation order in a chapter 11 case precluded a creditor from seeking attorneys fees. 2000 WL 236368 at *4. The confirmation order contained the following language:

> Upon confirmation of the Plan, the Debtor shall be discharged of any and all obligations due any creditor and party in interest, except as provided herein. This discharge shall be complete and without condition.

Id. at *3. The Court concludes that Powe and Moore's cases are distinguishable from *Rovell*. First, neither plan had the strong language of the *Rovell* plan. Second, apparently § 502(j) was not raised in *Rovell* because Judge Ginsberg did not address it. This court could easily conclude that the paragraph quoted above is a waiver of § 502(j) and perhaps this is what the parties and court believed. In any event, neither of these cases involve such a clear waiver.

6.

Chrysler asserts that Powe's claim was waived by Powe or he is estopped from asserting it due to his knowledge of the claim, particularly at the time of the relief from stay order. As to Moore, Chrysler asserts that her payoff of the claim is a waiver or estoppel. *Draughon v. General Credit Finance Corp.*, 362 So.2d 880 (Ala. 1978); *Robinson v. Boohaker*[,] *S*[*c*]*hillaci & Co., P.C.*, 767 So.2d 1092 (Ala. 2000). As stated before, since the Bankruptcy Code at § 502(j) gives a debtor the right to seek reconsideration of a claim at any time, there can be no waiver or estoppel simply due to prior allowance of the claim. Chrysler did submit an order to the Court, reviewed by Powe's counsel, which Chrysler believed approved its $275 fee. Powe's counsel said he did not understand the order in that way. The Court certainly did not understand its intent. There was no "intentional relinquishment of a right."

Moore did pay the debt, but that payment is not a waiver if a lawsuit is pending in which she was a class member which seeks to disallow the fee. Moore indicated that she knew of the suit when she paid off her case. Also, Ms. Moore's completion of her plan involved no release being given to Chrysler. Equitable estoppel requires a different set of facts and different rights for debtors under the Bankruptcy Code than are present in the law.

7.

Chrysler's next argument is that the debtor's claims are barred by unclean hands or equitable estoppel. Again, this is a twist on the res judicata argument. Because Powe and Moore knew of Chrysler's attorneys fee claim (because it was in the proof of claim, or objection to the plan, or relief from stay order) and they were silent until this suit, they cannot recover. Section 502(j) contemplates reconsideration. It cannot be barred when the Code specifically allows it.

8.

Chrysler's final defense is that Chrysler's fees were reasonable. This is a fact driven issue which cannot be decided at the summary judgment stage. The amount of the fee, the expertise of the persons who perform the work (e.g., attorney or paralegal), the timing of the work are all questions which are in dispute. Summary judgment must be denied.

Class Certification Motion

As with the summary judgment issues, the Court will not repeat what has already been stated in prior orders in the other class action case orders in this Court. *Slick v. Norwest Mortgage, Inc. (In re Slick)*, Case No. 98-14378, Adv. No. 99-1136 (Bankr. S.D. Ala. orders dated December 29, 2000 and March 6, 2001); *Noletto v. Nationsbanc Mortgage Corp. (In re Noletto)*, Case No. 98-13813, Adv. No. 99-1120 (Bankr. S.D. Ala. orders dated December 29, 2000 and February 8, 2001); *Sheffield v. Homeside Lending, Inc. (In re Sheffield)*, Case No. 97-10511, Adv. No 99-1124 (Bankr. S.D. Ala. orders dated December 29, 2000 and March 6, 2001); *Miller v. First Union Bank (In re Miller)*, Case No. 97-12807, Adv. No. 99-1137 (Bankr. S.D. Ala. orders dated December 29, 2000 and February 8, 2001); *Harris v. First Union Mortgage Corp. (In re Harris)*, Case No 96-14029, Adv. No 99-1144 (Bankr. S.D. Ala. orders dated December 29, 2000 and February 8, 2001). Those conclusions are incorporated by reference. The prior rulings allowed the certification of a class in those cases. Therefore, Chrysler's issues will be addressed in abbreviated fashion.

1.

Chrysler asserts it has additional claims it will assert against some class members if a class is certified. The claims include previously unclaimed late charges and interest. These are not compulsory counterclaims. Compulsory counterclaims, according to Fed. R. Bankr. P. 7013(a) are those which "arise out of the same transaction or occurrence that is the subject matter of the opposing party's claim and [do] ... not require for [their] ... adjudication the presence of third parties of whom the

court cannot acquire jurisdiction." The claims are not for attorneys fees, but are for other unrelated charges. An entirely different set of facts is at issue. There is also the issue that these claims may be time barred at this point. Fed. R. Bankr. P. 3002(c) ("In a chapter . . . 13 . . . case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors.") If Chrysler wishes to assert such claims, it will have to seek to amend it claims in each case in each bankruptcy court. Chrysler is free to do this at any time. However, these claims will not be considered in this suit.

2.

Chrysler argues that the Court lacks subject matter jurisdiction over the class action claims. The Court has previously ruled on this issue. *Noletto v. Nationsbanc Mortgage Corp. (In re Noletto),* 244 B.R. 845 (Bankr. S.D. Ala. 2000).

3.

Chrysler next asserts that even if the Court does have jurisdiction, it should abstain from exercising it due to comity. As stated in the other cases, the Court will not be interfering with other courts' orders by handling this class. The relief granted will be mainly injunctive requiring Chrysler to not "post" the fees to its debtors' accounts. Since Chrysler uses the chapter 13 trustees' records as its accounts, it will require Chrysler to amend its claim so the fees are not posted if the Court ultimately determines the fees are in some manner improper. This does not require any action of the bankruptcy court or trustee – only Chrysler – which uses the trustee's records as their own.

The Court is not reforming or changing any court's practices or procedures or rulings. It is changing Chrysler's behavior. Chrysler cannot escape potential liability by abdicating all record keeping functions to the trustees and then claiming court involvement.

4.

Chrysler argues Powe and Moore lack standing. The Court has already ruled on this issue in part D5 above.

5.

Chrysler asserts Powe and Moore have not satisfied their burden of proving the elements of Rule 23. Plaintiffs Exhibits 103-106 prove otherwise. They show patterns of disclosure in Chrysler cases in different areas of the country. The plaintiffs do not have to prove that every case is handled in the exact same manner. There must only be a pattern which gives rise to a class which is identifiable. *Appleyard v. Wallace,* 754 F.2d 955 (11th Cir. 1985). The class can be divided into subclasses, if necessary, to account for variations. The fact is Chrysler filed proofs of claim which did not state any fee at all was charged (and it is unclear to the Court if a fee was in fact charged and just not disclosed); it filed proofs of claim seeking "attorneys fees"; it filed proofs of claim seeking "bankruptcy attorneys fees" and other descriptions. Those with sufficient disclosure (e.g., Exhibit 106 claims) will not be part of the class.

6.

Numerosity has been established by Plaintiffs' Exhibits 103-106. In the cases where fees are claimed, the fees are "posted" to each debtor's account because Chrysler relies on the chapter 13 trustees' records which reflect Chrysler's claims with attorney fees included. Therefore, every debtor with an insufficient description who has had the fee included in his or her case is a class member.

7.

The commonality requirement is satisfied. All debtors in the class will have, at the least, the common issue of whether no disclosure of fees (if fees are charged with no disclosure) or inadequate disclosure is a violation of § 506(b), and whether a flat fee for anticipated future services is reasonable. There may be other common issues as well. These issues do not require looking at the facts of a particular case for resolution.

8.

The typicality requirement is satisfied by Powe and Moore. They both were charged flat rate attorneys fees which were disclosed in Chrysler's proof of claim only as "attys fee." Moore has paid all of the fee; Powe has paid none of the fee. Powe still has his fee "posted" to his account. The claims of Powe and Moore are not moot for all of the reasons stated above.

9.

Powe and Moore are adequate class representatives because the Court has already ruled they have standing

and their claims are sufficiently similar to other class members.

10.

The Court will not restate why it concludes that Rule 23(b)(2) is the appropriate section under which the class should be certified. The reasoning of the opinion in *In re Noletto, et al.*, referred to on page 7 of this opinion.

The arguments about res judicata and lack of the right to an injunction were also previously discussed. An injunction is the most appropriate and prevalent relief which will be due the class.

The fact that Chrysler's attorney in this district or any other has changed the manner in which fees are disclosed in proofs of claim does not solve the problem for prior cases.

11.

The law on disclosure of attorneys fees is not entirely uniform. Some courts have set a higher standard of disclosure than this Court. *See, e.g., Tate v. NationsBanc Mortgage Corp. (In re Tate),* 253 B.R. 653 (Bankr. W.D.N.C. 2000). Those districts will be excluded. The parties will be required to propose class definitions which will let this issue be determined. Chrysler argues that the standard is different in Tennessee. *In re Keaton,* 212 B.R. 587 (E.D. Tenn. 1997), *vacated on other grounds, Keaton v. Boatmen's Bank of Tennessee,* 145 F.3d 1331 (6th Cir. 1998); *In re Byrd,* 192 B.R. 917 (E.D. Tenn. 1996). At the time the class definition is determined, this issue can be addressed.

Even excluding the districts in North Carolina and Tennessee leaves numerous class members.

12.

As stated above, injunctive relief would not interfere with other courts' orders. Chrysler would be ordered to do something; no court itself would be affected.

13.

The return of money is incidental to the injunctive relief. The bulk of the cases will need the injunction. Monies returned will be incidental to that relief. In fact, if fees are paid only at the end of each case, the monetary damage will be minimal.

14.

The Court will not discuss Rule 23(b)(3) since it is not certifying a class under that part of Rule 23.

CONCLUSION

For most of the same reasons as the prior cases of *Noletto*, *Sheffield*, *Slick*, *Miller* and *Harris* had summary judgment denied and class certification granted, this case also is an appropriate, viable case. The case will proceed to trial roughly in tandem with the other cases.

THEREFORE, IT IS ORDERED:

1. The Debtors' and Chrysler's Motions to Strike are DENIED.

2. The Defendant's Motion for Summary Judgment is DENIED.

3. Plaintiffs' Motion for Class Certification is GRANTED.

4. The plaintiffs and defendant shall file proposed class definitions by July 1, 2001.

5. A status hearing will be held on July 11, 2001 at 1:00 p.m. on this case.

Dated: June 1, 2001

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

**In re Claude Joseph NOLETTO, Jr.
and Terry Lynn Noletto, Debtors.**

**Claude Joseph Noletto, Jr. and
Terry Lynn Noletto, Plaintiffs,**

v.

Nations[B]anc Mortgage Corp., Defendant.

Corliss M. Miller and Franklin L. Miller, Debtors.

Corliss M. Miller and Franklin L. Miller, Plaintiffs,

v.

First Union National Bank, Defendant.

Roland E. Harris, Debtor.

Roland E. Harris, Plaintiff,

v.

First Union Mortgage Corp., Defendant.

Michael F. Powe, Debtor.

Michael F. Powe, Plaintiff,

v.

Chrysler Financial Corp., Defendant.

Rocky Dwayne Sheffield, Debtor.

Rocky Dwayne Sheffield, Plaintiff,

v.

Homeside Lending, Inc., Defendant.

Catherine D. Slick, Debtor.

Catherine D. Slick, Plaintiff,

v.

Norwest Mortgage, Inc., Defendant.

Bankruptcy Nos. 98-13813-MAM-13, 97-12807-MAM-13, 96-14029-MAM-13, 98-10935-MAM-13, 97-10511-MAM-13, 98-14378-MAM-13.

Adversary Nos. 99-1120, 99-1137, 99-1144, 99-1121, 99-1124, 99-1136.

United States Bankruptcy Court,
S.D. Alabama,
Southern Division.

Feb. 15, 2000.

Steve Olen, Donald J. Stewart, Mobile, Alabama, for the Debtors.

John N. Leach, Jr., Mobile, Alabama, Russell J. Pope, Towson, Maryland, for First Union Mortgage Corp. and First Union National Bank.

Thomas Hefferon, Washington, D.C., for Homeside Lending, Inc.

Jeffery Hartley, Mobile, Alabama, for Homeside Lending, Inc. and NationsBanc Mortgage Corp.

M. Donald Davis, Jr., Mobile, Alabama, C. Lee Reeves, Birmingham, Alabama, for Chrysler Financial Corp.

Henry A. Callaway, III, Windy C. Bitzer, Mobile, Alabama, for Norwest Mortgage, Inc.

ORDER CONCLUDING THAT DISTRICT COURT AND BANKRUPTCY COURT HAVE SUBJECT MATTER JURISDICTION AND THAT MATTERS ARE CORE PROCEEDINGS

MARGARET A. MAHONEY, Chief Judge.

These matters are all class action suits against the named defendants for alleged violations of federal bankruptcy law. Plaintiffs request that each suit be certified as a nationwide class. Each complaint consists of the following four counts:

1. Fees and charges assessed by the defendants postpetition are not reasonable, authorized, or allowable under the Bankruptcy Code and defendants' claims for any of these fees or charges should be disallowed and any of these fees or charges actually collected by defendants should be reimbursed with interest.

2. Fees and charges assessed by defendants postpetition are assessable only with specific bankruptcy court approval pursuant to § 506(b) of the Bankruptcy Code, defendants failed to obtain such approval, and these fees and charges collected by defendants after the filing of a bankruptcy petition, which would not have been claimed absent bankruptcy, should be disallowed, and any of these fees or charges collected should be reimbursed with interest where defendants have failed to obtain specific approval of the bankruptcy court as required by law.

3. Defendants violated the automatic stay of § 362 of the Bankruptcy Code by assessing and/or collecting postpetition, fees or charges which would not have been claimed absent bankruptcy, without specific approval of the bankruptcy court and these fees or charges should be disallowed and any of these fees or charges actually collected should be reimbursed with interest where the defendants have failed to obtain specific approval of the bankruptcy court.

4. Plaintiffs are entitled to an order declaring defendants' acts and practices to be in violation of bankruptcy law, an order permanently enjoining the defendants from engaging in such acts and practices in the future with respect to any debtor who is, or could become, a member of the class, and an order requiring the defendants to disgorge all amounts collected by defendants as a result of such illegal fees and charges with interest.

The facts pertaining to each case differ in some respects, but those differences are not being considered for purposes of these motions to dismiss for lack of subject matter jurisdiction. To the extent the facts of each individual case of the named plaintiff might impact on the broad ruling in this order, those facts will be considered at another time.

The defendants have filed motions to dismiss their adversary proceedings under Fed. R. Bankr.P. 7012. For purposes of this ruling, the Court assumes that all of the plaintiffs' allegations, other than jurisdiction, are true. *Rainwater v. State of Alabama (In re Rainwater),* 233 B.R. 126, 140 (Bankr.N.D.Ala.1999). The defendants allege that, as to all of the class action suits, this Court and the district court have no subject matter jurisdiction except as to the named plaintiffs.[1] The Court disagrees and concludes that it and the district court have subject matter

[1] The Court previously held in an oral ruling on October 22, 1999 that it has jurisdiction over the individual named debtors' proceedings. For the same reasons, the Court has jurisdiction over any class members' proceedings who are debtors in the Southern District of Alabama.

jurisdiction over the potential class members' lawsuits and concludes that the bankruptcy court's jurisdiction is core.

I.

A.

The jurisdiction of the district courts (from which the bankruptcy court's jurisdiction is derivative) over bankruptcy matters is established in 28 U.S.C. § 1334. *Continental Nat. Bank of Miami v. Sanchez (In re Toledo),* 170 F.3d 1340, 1344 (11th Cir.1999). Section 1334(b) states in part: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Generally, " '[a]rising under' proceedings are matters invoking a substantive right created by the Bankruptcy Code." *Toledo,* 170 F.3d at 1345 (cites omitted). "[A]rising in" proceedings involve "administrative-type matters, or . . . 'matters that could arise only in bankruptcy.' " *Id.*

The plain meaning of the words used in the statute gives a district court jurisdiction over suits such as these in which the issues relate only to federally created bankruptcy law. *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (plain meaning of legislation is conclusive except in rare cases) (cite omitted). These class actions clearly fit within the plain language of the "arising under" or "arising in" jurisdictional categories. All of the debtors' claims will be determined from the statutory provisions of the Bankruptcy Code.

This reading is consistent with the legislative history to the Bankruptcy Code. H.R.Rep. No. 595, 95th Cong., 1st Sess. 445 (1977), U.S.Code & Cong. & Admin. News pp.

5963, 6401 ("The phrase 'arising under' has a . . . broad meaning in the jurisdictional context").[2] Section 1334(b) was intended to give broad jurisdiction to the district courts over bankruptcy matters. *Id.* ("Subsection (b) is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts."). The Bankruptcy Code, unlike its predecessor, the Bankruptcy Act, gives the district courts *in personam* as well as *in rem* jurisdiction. *Id.* A court no longer is restricted to dealing only with assets under its control; it also has the ability to deal with other matters affecting debtors. This broader jurisdictional scope is clearly apparent in the grant of "related to" jurisdiction to the courts. 28 U.S.C. § 1334(b). Pursuant to this grant, bankruptcy jurisdiction may even extend to litigation between nondebtor parties if it "could conceivably have any effect on the estate being administered in bankruptcy." *Miller v. Kemira, Inc. (Matter of Lemco Gypsum, Inc.),* 910 F.2d 784, 788 (11th Cir.1990) (adopting definition established in *In re Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir.1984)).

To the extent that the defendants argue that there is not subject matter jurisdiction because these suits (as they relate to debtors in other courts) are not "related to" the

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[2] The 1977 House Report addresses former 28 U.S.C. § 1471 which was repealed by Pub.L. No. 98-353 § 122 (1984). Current 28 U.S.C. §§ 1334(a) and (b), enacted by § 101 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, repeat former §§ 1471(a) and (b) verbatim.

individual debtors in this Court, they ignore the language "arising under" or "arising in" a case under title 11. Section 1334(b) is phrased disjunctively. The three categories offer alternative bases of bankruptcy jurisdiction.

Section 1334(b) must be read this way as well in order to give meaning to another part of title 28 – the venue provisions covering the most appropriate place for bankruptcy proceedings to be filed. *See,* BLACKS LAW DICTIONARY 795 (7th ed.1999) (statutes on the same subject matter may be construed together to avoid inconsistencies pursuant to the cannon of statutory construction *in pari materia*). Both the venue provisions and section 1334(b) are found in chapter IV of title 28. If there were not nationwide jurisdiction over bankruptcy cases, there would be no need for the venue provisions. Richard A. Gibson, *Home Court, Outpost Court: Reconciling Bankruptcy Case Control With Venue Flexibility in Proceedings,* 62 AM. BANKR. L.J. 37, 42 (Winter 1988) (citing *Littleton National Bank v. Coleman American Companies, Inc. (In re Coleman American Companies, Inc.),* 6 B.R. 251, 253-54 (Bankr.D.Colo. 1980)). The venue provisions are meaningless if the "home court" is the only forum with jurisdiction over bankruptcy proceedings.[3] *See, Hohn v. United States,* 524 U.S. 236, 118 S.Ct. 1969, 1976, 141 L.Ed.2d 242 (1998) (court normally should not adopt a construction of statute making another statutory provision superfluous) (citing *Kawaauhau v. Geiger,* 523 U.S. 57, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998)).

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[3] "Home court" refers to the district in which the bankruptcy case was filed or is pending. "Outpost court" refers to any other district. Gibson, *supra,* at 38.

Bankruptcy jurisdiction was purposefully designed to encompass all of the issues debtors could encounter in a bankruptcy case. The Court found no evidence that debtor class actions were envisioned by the drafters, but the jurisdictional statutes were written in a manner to cover even these actions. This is appropriate. Otherwise there might be no affordable universal redress for creditor bankruptcy abuses which could arise. *See, Conley v. Sears, Roebuck & Co.,* 222 B.R. 181, 185-86 (D.Mass.1998) (sitting jointly, district and bankruptcy court judges certified nationwide class for settlement purposes); *Coggin v. Sears, Roebuck & Co. (In re Coggin),* 155 B.R. 934 (Bankr.E.D.N.C.1993) (court found it had subject matter jurisdiction over class action consisting of debtors from Eastern and Middle districts of North Carolina).

B.

Defendants assert that pursuant to 28 U.S.C. § 1334(e), only the bankruptcy court for the district in which a debtor's case is pending has jurisdiction over a cause of action owned or brought by that debtor. Section 1334(e) provides: "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." The Court concludes that defendants' view fails to take into account other provisions of title 28, in particular, §§ 1452, 1334(c) and 1409, all of which will be discussed below.

Defendants cite as authority for their position the case of *Williams v. Sears, Roebuck & Co. (In re Williams),* CV199-168 (S.D.Ga. January 19, 2000). [Editor's Note:

Williams v. Sears, Roebuck & Co. appears at 244 B.R. 858.] Judge Anthony A. Alaimo held in *Williams* that § 1334(e) precludes a court from exercising bankruptcy jurisdiction over claims that are estate property unless the individual bankruptcy cases were commenced in that court's district. *Id.* at 866. Accordingly, Judge Alaimo dismissed a complaint brought by a nationwide class of debtors with respect to debtors who commenced their cases in courts other than the district in which Judge Alaimo sits. Judge Alaimo's expansive interpretation of § 1334(e) was based on the provision's plain language and the objective of the Bankruptcy Code "to insure that only one court administers the bankruptcy estate of a debtor." *Id.* at 866. This Court respectfully disagrees with Judge Alaimo's position.

Section 1334(e) provides the "home court" with "exclusive jurisdiction . . . of property of the estate." These class actions involve claims of each debtor against the defendants. If the causes of action are not property of each debtors' estate, then § 1334(e) is not applicable. Courts have varying opinions as to whether property acquired by a chapter 13 debtor postpetition is property of the estate, at least after confirmation of a plan. *Compare, In re Petruccelli,* 113 B.R. 5 (Bankr.S.D.Cal.1990) (property revests in debtor); *In re Kolenda,* 212 B.R. 851 (W.D.Mich.1997) (estate remains in tact and includes postconfirmation income and property); *In re McKnight,* 136 B.R. 891 (Bankr.S.D.Ga.1992) (only income necessary to fund plan constitutes estate property).

To the extent that the class action claims are not property of the debtors' estates because they arose postconfirmation, § 1334(e) does not control this motion to dismiss for lack of jurisdiction. To the extent that they are property of the estates, either because the claims arose

before confirmation or because the court has concluded that all property of a debtor remains property of the estate until discharge or other order of the court, then this Court and any other court must determine if § 1334(e) vests the "home court" with exclusive jurisdiction.

Judge Alaimo concludes that the meaning of § 1334(e) is clear. The plain meaning of the Bankruptcy Code does govern to the extent the meaning can be clearly discerned. *Ron Pair, supra,* 489 U.S. at 240, 109 S.Ct. 1026. However, the Court concludes that the meaning of the statute is not clear on its face because the meaning the *Williams* case ascribes to § 1334(e) makes the section inconsistent with other related bankruptcy jurisdiction and venue provisions of title 28. In such a case, a court must look beyond the plain meaning. *Ron Pair, supra,* 489 U.S. at 240-41, 109 S.Ct. 1026 (plain meaning governs "as long as the statutory scheme is coherent and consistent."); *see also,* BLACK'S, *supra,* (defining *in pari materia*).

Section 1334(e) is found in Part IV of title 28 of the United States Code, §§ 1251-1631, which deals with jurisdiction and venue. 28 U.S.C. § 1452(a) provides: "A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." Thus, removal pursuant to § 1452 is proper only to a court with jurisdiction pursuant to § 1334. If § 1334(e) gave exclusive jurisdiction over all proceedings involving estate property to the "home court," then most bankruptcy proceedings pending in an "outpost" district could not be removed. Section 1452's limited applicability "to the district court for the district where such civil action is

pending" would rarely have any meaning because only one district would have jurisdiction, the "home court" district.

In *Cook v. Cook,* 220 B.R. 918 (Bankr.E.D.Mich.1997), Bankruptcy Judge Arthur J. Spector found that § 1334(e) precluded a debtor from invoking § 1452 to remove a matter filed in a state court not located in the district in which the debtor's bankruptcy case was pending. The district in which the state court is located did not have jurisdiction under § 1334(e) according to the reasoning in *Cook.* Like Judge Alaimo, Judge Spector relied primarily on the language of § 1334(e). Judge Spector conceded that an expansive view of exclusivity under § 1334(e) was "somewhat hard to square with §§ 1334(b) and 1409," *id.* at 923, but nevertheless, he disagreed with the debtor who argued that § 1452 had to have some meaning.[4] Judge Spector gave § 1334(e) primacy.

Judge Spector's rationale seems arguably to contradict itself. First, he consoled the defendant-debtor by noting that § 1334(e) not only precluded Judge Spector from exercising jurisdiction, but also precluded the state court in which the suit was initially filed from exercising jurisdiction. *Id.* at 920. Later, he stated:

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[4] Judge Spector cited and disagreed with a line of cases supporting the view that § 1452 does not require removal to the "home court" district notwithstanding § 1334(e). Included was an opinion by Judge John V. Singleton which was based on this Judge's report and recommendations while sitting in the Bankruptcy Court for the Southern District of Texas. *Gabel v. Engra, Inc. (In re Engra, Inc.),* 86 B.R. 890 (S.D.Tex.1988). This Court adheres to its holdings in *Engra* to the extent § 1334(e) is implicated and believes that this opinion is consistent with it.

> there is no obvious reason to suppose that "exclusive" jurisdiction can never be surrendered by the court which has it. Indeed, acceptance of that proposition would mean that § 1412 is an all-but-useless provision: it could only be invoked on those infrequent occasions when the dispute does not involve property of the estate or debtor. The most sensible conclusion, then, is that exclusivity does not preclude a court from transferring a proceeding to a different court.

Id. at 922. Thus, Judge Spector ruled that § 1334(e) precluded the state court from exercising jurisdiction, but then found that, although exclusive, a court may in essence convey its exclusive jurisdiction to state courts. The jurisdiction he envisioned for the district and bankruptcy courts is both exclusive and concurrent. Judge Spector's view, even though allowing transfer of venue to permit a party to invoke § 1452, still gives the provision virtually no meaning and strips the term "exclusive" of its meaning. This is incorrect in this Court's view. *See,* Sharyl Walker, *Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation,* 67 CORNELL L. REV. 219, 240 (1981) (federal courts should always decide claims in their exclusive jurisdiction when there is no concurrent action pending in another court).

A broad reading of § 1334(e)'s scope is also inconsistent with § 1334(c). Subsection (c) of 1334, the mandatory and discretionary abstention provision, permits, and under some circumstances requires, a district court to abstain from hearing a proceeding even if it falls within the scope

of its jurisdiction under 1334(b).[5] Thus, a district court may decline to hear proceedings with unsettled state law issues or issues that would more properly be heard in another forum, without infringing upon its "exclusive and non-delegable control over the administration of an estate within its possession." *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 483, 60 S.Ct. 628, 84 L.Ed. 876 (1940); H.R.Rep. No. 595, 95th Cong., 1st Sess. 446 (1977), U.S.Code & Cong. Admin. News p. 6401 (citing *Thompson* favorably). An expansive reading of § 1334(e) would render § 1334(c) virtually useless. "Exclusive" jurisdiction would preclude abstention when most appropriate. Most debtor complaints with state law issues could not be heard by a state court because they would be estate property subject to the exclusive jurisdiction of the district court in which the debtor's bankruptcy case is pending. Moreover, district courts are required to abstain under § 1334(c)(2) from proceedings that may include estate property, but state courts could not hear these proceedings because they are within the exclusive province of these same district courts. This illogical result could not have been the intent of § 1334.

Judge Alaimo's interpretation of § 1334(e) creates an even greater inconsistency with the bankruptcy venue provisions. Like § 1334, these provisions are found in Part IV of title 28. Section 1409(b) provides that the district in which the defendant resides is the only venue for proceedings "arising in" or "related to" a bankruptcy case brought by a trustee "to recover a money judgment of or property

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[5] Jurisdiction over bankruptcy proceedings is nonexclusive under § 1334(b).

worth less than $1,000 or a consumer debt of less than $5,000." Under § 1409(d), a trustee may commence a bankruptcy proceeding arising postpetition from the operation of the business of the debtor only in the district in which, "under applicable nonbankruptcy venue provisions, an action on such claim may have been brought." There are situations when a proceeding is estate property and also subject to 1409(b) or (d). *See, e.g., Appel v. Gable (In re B & L Oil Co.),* 834 F.2d 156 (10th Cir.1987) (complaint for turnover of estate property; reversed and remanded to determine if proceeding arises from operation of DIP's business thereby requiring application of § 1409(d)); *McGregor v. American Express Travel Related Services Co. (In re Griffith),* 215 B.R. 893 (Bankr.M.D.Ala. 1997) (preference action; 1409(b) examined); *Britt Airways, Inc. v. Harris County Appraisal District (In re Britt Airways, Inc.),* 169 B.R. 533 (Bankr.D.Del.1994) (motion pursuant to 1409(d) denied); *Transicoil, Inc. v. Blue Dove Development Assoc. (In re Eagle-Picher Industries, Inc.),* 162 B.R. 140 (Bankr.S.D.Ohio 1993) (same); *Jim Walter Resources Inc. v. S.E. Belcher, Jr. (In re Hillsborough Holdings Corp.),* 146 B.R. 1008 (Bankr.M.D.Fla.1992) (venue in "home court" improper pursuant to § 1409(d); proceeding transferred to "outpost court" pursuant to § 1412); *Luper v. Capital Conveyor (In re Lee Way Holding Co.),* 104 B.R. 881 (Bankr.S.D.Ohio 1989) (turnover action; objection pursuant to § 1409(b) waived). In determining whether §§ 1409(b) or (d) applied, these courts have assumed that § 1334(e) was not applicable because of its narrow scope. If the defendants' view of § 1334(e) governed, the only court with the power to hear those proceedings would be "the district court in which [the debtors'] case under title 11" was pending and neither § 1409(b) nor (d) could change this. A broad interpretation of 1334(e)'s

scope causes a conflict with §§ 1409(b) or (d) if venue in the "home court" is improper under one of the latter provisions and estate property is involved. Exclusive "home court" jurisdiction renders §§ 1409(b) and (d) meaningless in these situations. *Hillblom v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.),* 61 B.R. 758, 766 (S.D.Tex.1986).

Based on the scheme of the applicable statutes, this Court finds that § 1334(e) does not clearly define the scope of its exclusive jurisdiction of property of the estate. Does it include all proceedings involving property of the estate, only proceedings to administer and distribute estate property? Does it only grant exclusive "control" of estate property or something else? The Court finds that this ambiguity, and the inconsistencies between Part IV of title 28 and an expansive interpretation of § 1334(e) permit the Court to refer to the legislative history to clarify § 1334(e).

A major impetus of the 1978 Code was "to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the . . . dichotomy between summary and plenary jurisdiction." S.Rep. No. 989, 95th Cong., 2d Sess. 17-18 (1978), U.S.Code & Cong. Admin. News pp. 5787, 5803. In general, summary jurisdiction included actions relating to estate administration or estate property in the possession of the court. J. Ferriell, *Core Proceedings In Bankruptcy Court,* 56 UMKC L. REV. 47, 83-84 (1987). Plenary actions included complaints against parties who had not consented to the bankruptcy court's authority or where the property was not in the actual or constructive possession of the court. *Id.* Bankruptcy referees under the 1898 Bankruptcy Act were not permitted to hear plenary actions. *Id.* They could exercise most of the district court's

summary jurisdiction. *Id.* Section 1334 was intended to "eliminate entirely" the summary/plenary jurisdictional dichotomy. *Id.* Section 1334(b) extends bankruptcy jurisdiction to include *in personam* jurisdiction. H.R.Rep. No. 95-595, *supra,* at 445, U.S.Code & Cong. Admin. News at 6401. Bankruptcy jurisdiction over property within its constructive or actual possession, i.e., *in rem* jurisdiction, continued as well under § 1334. *Id.* ("The bankruptcy court is given in personam as well as in rem jurisdiction . . . . ").[6]

Section 1334(e) went a step further and designated the "home court" the exclusive jurisdiction for resolving *in rem* claims against estate property. It overrides the general conflict of jurisdiction rule that the first court to assert jurisdiction has exclusive jurisdiction over an *in rem* claim. *Penn General Casualty Co. v. Commonwealth of Pennsylvania,* 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935). This is the extent of § 1334(e). *In the Matter of United States Brass Corp.,* 110 F.3d 1261, 1268 (7th Cir.1997).

This interpretation of § 1334(e) does not leave it without any meaning. *See, Cook,* 220 B.R. at 923 (finding that courts limit "exclusivity" by inferring that "§ 1334(e) means nothing at all"). First, exclusive *in rem* jurisdiction is an important aspect of bankruptcy jurisdiction. Second, the efficacy of bankruptcy depends on the existence of one court to control assets and distribute them in accordance

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[6] *In rem* proceedings are those under which an obligation is to be enforced against a thing, or item of property, regardless of the persons involved. An *in personam* action seeks to impose an obligation on a person. *See,* BLACK'S LAW DICTIONARY 856-57 (7th ed.1999) (defining jurisdiction *in rem* and *in personam*).

with the priority scheme established by the Bankruptcy Code. Section 1334(e) grants this power exclusively to the "home court." For instance, if a "non-home court" determines that a party is liable to a debtor and must pay damages, the damages will be paid to the trustee or debtor-in-possession and will be distributed according to rulings and procedures of the "home court." Collection or liquidation of estate property may not require knowledge of bankruptcy law and may be conducted in any appropriate nonbankruptcy or "outpost" forum. Section 1334(e) accomplishes this. It vests the "home court" with the exclusive power to control and distribute property of the estate without requiring it to determine the extent of property of the estate.

Defendants' reading of § 1334(e) would leave bankruptcy courts in gridlock. This Court alone has granted many motions for relief from stay to liquidate claims in state court and has abstained to allow parties to proceed in state court for the same purpose. These proceedings often involve estate property. Once liquidated, the property is required to be turned over to the court, trustee, or debtor-in-possession. Defendants' view of § 1334(e) would compel this Court to hear these matters, even if nonbankruptcy law controls or the matter is ready to be tried in state court. This Court holds that § 1334(e) does not have such a far-reaching effect. Although its language is admittedly not expressly limited to *in rem* jurisdiction, this Court finds that based on the statutory scheme, the legislative history and the nature of bankruptcy practice, § 1334(e) is limited to giving the "home court" exclusive jurisdiction over *in rem* matters.

With the foregoing analysis in mind, the Court finds that § 1334(e) does not make the "home court" the

exclusive forum to hear debtor complaints regarding violations of the Bankruptcy Code. Such proceedings are not *in rem* matters. *See, U.S. Brass, supra,* at 1267-68 (§ 1334(d)[7] does not deprive "outpost court" of jurisdiction over debtor's complaints regarding scope of insurance policies). These proceedings seek to impose liability on various corporations for actions taken (or not taken) by them. These proceedings have nothing to do with a specific item of property held by a debtor or all debtors.

II.

The defendants raise other issues as to why nationwide jurisdiction over bankruptcy proceedings is not appropriate. Their arguments are:

A. This Court is not the proper venue for proceedings in cases of debtors not filed in this district.

B. This action is not a core proceeding.

C. This Court should abstain from hearing these proceedings as they pertain to debtor cases not filed in this district.

D. Exercising jurisdiction will require this Court to collaterally attack other court's final orders.

Admittedly, some of these issues loom very large in the future of these actions. They are roadblocks which may limit the size of any class or the scope of the issues covered. However, this Court is unwilling to conclude that its

[7] Former § 1334(d), was redesignated as current § 1334(e) by § 104(b) of the Bankruptcy Reform Act of 1994, Pub.L. No. 103-394.

jurisdiction is limited by these issues. They are separate from jurisdiction and need to be recognized as such. The Court will address each of these issues only to the extent appropriate at this time.

A.

As stated above, the venue statute does not preclude nationwide jurisdiction; it, in fact, supports it or there is no need for the venue provisions. However, the defendants assert that if that is true, the appropriate venue for each debtor is where the debtor's case is filed. This argument is premature. Class certification issues include "the interest of members of the class in individually controlling the prosecution . . . of separate actions . . . [and] the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Bank. P. 7023(b)(3). This issue should be taken up in conjunction with class certification.

B.

Defendants assert that the class action suits are not core proceedings under 28 U.S.C. § 157(b). Therefore, this Bankruptcy Court cannot hear and determine these motions or any part of these proceedings. Defendants assert that the District Court should withdraw the reference or this Court should certify findings and conclusions to the District Court for its ruling. The defendants want to avoid multiple appellate layers if possible, while also disputing the Bankruptcy Court's and District Court's jurisdiction over these proceedings. The issue would be premature to the extent that the Court has before it solely the issue of jurisdiction at this time. *In re Toledo,* 170 F.3d

at 1345 n. 6 (whether a proceeding is core is analytically separate from whether there is jurisdiction). However, in order to decide whether to certify this ruling to the District Court, this issue does have to be addressed.

Through the District Court's jurisdiction over bankruptcy matters, this Court also has jurisdiction as the District Court's "unit." 28 U.S.C. § 151. Section 157(a) of title 28 refers all proceedings "arising under title 11 or arising in . . . a case under title 11" to the bankruptcy judges for the district. The Order of Reference of this District dated July 20, 1984 (effective July 10, 1984) clearly makes that reference.

In the mass of referred matters, bankruptcy judges can hear and determine all "core proceedings." Core proceedings include matters which relate to the administration of bankruptcy cases, matters concerning property of the estate and avoiding actions. 1 COLLIER ON BANKRUPTCY ¶ 3.02[3] (15th ed.1999). There is no definition of a core proceeding in title 28. The defendants argue that core proceedings are only matters connected to bankruptcy cases over which this bankruptcy judge or the judges in this district have control. Plaintiffs assert that this interpretation is too narrow a reading of "core proceedings."

The scheme of core and noncore proceedings was established as a result of the *Marathon* decision of the U.S. Supreme Court. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Prior to that ruling, the 1978 Code gave bankruptcy judges the authority to finally determine all matters that were within the district court's bankruptcy jurisdiction. In its plurality opinion in *Marathon*,

the Supreme Court held that bankruptcy judges could not finally determine state law claims. *Marathon,* 458 U.S. 50, 102 S.Ct. at 2878. The Court held that "related to" jurisdiction was not to be exercised finally by bankruptcy judges. *Id.* The Court distinguished the "related to" proceedings from the "public rights" over which a bankruptcy court did have authority. *Id.,* 458 U.S. 50, 102 S.Ct. at 2871. "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages." *Id.*

Based on this decision, Congress passed 28 U.S.C. §§ 157(a) and (b) which gives core jurisdiction to bankruptcy courts over the cases and proceedings which *Marathon* did not take away. Section 157(c) gives noncore jurisdiction over *Marathon* type proceedings. The plaintiffs in this case have structured their complaints so *only* federally created bankruptcy issues are involved. No state created rights are at issue. Therefore, the class action suits are core proceedings. Even if defendants are correct in their assertion that these proceedings are not connected to bankruptcy cases over which the judges in this District have control, the core nature of these proceedings is not changed. *See, Aiello v. Providian Financial Corp. (In re Aiello),* 231 B.R. 693, 705 (Bankr.N.D.Ill.1999) ("[Related to] nexus, however, is not required when the Court is interpreting fundamental provisions of the Bankruptcy Code as to all of the class members").

The Supreme Court further explained its view of core versus noncore jurisdiction in *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) and *Langenkamp v. Culp,* 498 U.S. 42, 111 S.Ct.

330, 112 L.Ed.2d 343 (1990). The Court recognized that when a creditor files a claim in a bankruptcy case, it "triggers the process of 'allowance and disallowance of claims,' thereby subjecting . . . [itself] to the bankruptcy court's equitable power." *Langenkamp, supra,* 498 U.S. at 44, 111 S.Ct. 330 (citing *Katchen v. Landy,* 382 U.S. 323, 336, 86 S.Ct. 467, 476, 15 L.Ed.2d 391 (1966)). The creditors who are defendants in these cases filed claims in the debtors' chapter 13 cases.

It is true that the language of § 157(b)(2) speaks of "the estate" and "a case" and does not speak of them collectively. However, § 157(b)(2) is not an exclusive listing of core proceedings. It uses the words "includes, but are not limited to." Second, as to each matter in the class, the language is correct. For example, a proceeding is core if it concerns administration of the estate of a debtor, notwithstanding the pendency of the debtor's bankruptcy case in another district. 28 U.S.C. § 157(b)(2)(A).

28 U.S.C. § 1334(e), *supra,* also casts doubt on defendants' interpretation of § 157. This provision essentially limits *in rem* claims against estate property to the district in which a debtor's "case under title 11 is commenced or is pending." Thus, Congress knew how to limit jurisdiction over specific matters to the district in which the debtor's bankruptcy case is pending. Congress chose not to do so with respect to all bankruptcy proceedings. To the contrary, district courts have jurisdiction over bankruptcy proceedings, regardless of where the debtor's case is pending, and these proceedings "shall be referred to the bankruptcy judges for the district," once again, regardless

of whether the district is the one in which the debtor's bankruptcy case is pending. 28 U.S.C. §§ 157(a) and 1334(b).[8]

Therefore, the matters are core proceedings and this Court has the authority to enter a final order.

C.

Abstention is an action a court can take to dismiss a case even if it has jurisdiction. 28 U.S.C. § 1334. This motion is premature. Class certification includes consideration of issues such as "the interest of members of the class in individually controlling the prosecution ... of separate actions ... [and] the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Fed. R. Bankr.P. 7023(b)(3). This matter should be taken up in conjunction with that ruling.

D.

The defendants assert that the Court should dismiss the actions or abstain from them because the relief sought could modify or overrule final orders already made by other bankruptcy courts. The defendants are correct that courts should not allow parties to use this Court or any court to collaterally attack other courts' orders. *Celotex Corp. v. Edwards,* 514 U.S. 300, 115 S.Ct. 1493, 1501, 131

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[8] A bankruptcy court can exercise jurisdiction over a lawsuit which is not filed in the "home court." *See, e.g., A.B. Real Estate, Inc., SNA v. Bruno's, Inc. (In re Bruno's),* 227 B.R. 311 (Bankr.N.D.Ala.1998).

L.Ed.2d 403 (1995) ("It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected") (cites omitted). However, again, this issue is a premature one. The Court cannot rule on this issue until it is clear how the class to be certified will be defined. Fed. R. Bankr.P. 7023(b)(3) requires the court to consider at a class certification hearing, "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class . . . [and] the difficulties likely to be encountered in the management of a class action." This issue should be taken up in conjunction with that ruling.

Additionally, the definition of the class may exclude this issue. Perhaps some or all of the class members will not have final orders precluding these suits; perhaps section 502(j) is expansive enough to allow review; perhaps the class is only cases in this district or a limited number of districts; perhaps only injunctive relief will be sought. Until these matters are determined, this issue cannot be addressed.

III.

Defendants assert that the relevant jurisprudence other than Judge Alaimo's opinion discussed in Part I supports dismissal of these actions for lack of subject matter jurisdiction. They rely primarily on the three opinions by Bankruptcy Judge Jack B. Schmetterer for the Northern District of Illinois. Although Judge Schmetterer did dismiss three actions brought by a class of bankruptcy debtors, his decisions were based on more than a mere

lack of subject matter jurisdiction. The matters before him included state law claims which changes the issues and jurisdictional posture. *Wiley v. Mason (In re Wiley),* 224 B.R. 58 (Bankr.N.D.Ill.1998) (monetary relief for state and bankruptcy law claims would not effect estate of class representative; summary judgment based on undisputed voluntary payments by debtor); *Lenior v. GE Capital Corp. (In re Lenior),* 231 B.R. 662 (Bankr.N.D.Ill.1999) (state law claims preempted); *Knox v. Sunstar Acceptance Corp. (In re Knox),* 237 B.R. 687 (Bankr.N.D.Ill.1999) (state law claims preempted; no private right of action under Bankruptcy Code). To the extent that Judge Schmetterer opined that there is no bankruptcy subject matter jurisdiction over class action claims invoking substantive bankruptcy rights, this Court respectfully disagrees and adopts the reasoning of Bankruptcy Judge Erwin I. Katz, also for the Northern District of Illinois, in *Aiello v. Providian Financial Corp. (In re Aiello),* 231 B.R. 693 (Bankr.N.D.Ill.1999).

In *Aiello,* Judge Katz found core subject matter jurisdiction to hear a complaint composed of a nationwide class of debtors. The class complaint involved alleged automatic stay violations. The defendants in *Aiello* conceded that the named plaintiff's claim was a core proceeding, but argued that the court did not have jurisdiction to enforce the automatic stay on behalf of class members whose bankruptcy cases were not pending in Judge Katz's district. *Id.* at 703-704. Judge Katz disagreed because the cause of action "invokes a substantive bankruptcy right which could only arise in the bankruptcy context." *Id.* at 704. These matters are core. *Id.* The defendants "related to" argument was found to be irrelevant. *Id.* at 705. This reasoning applies equally to the class actions before this Court.

Although Judge Katz found that he had core subject matter jurisdiction over the class action, he found several deficiencies under Fed.R.Civ.P. 23 and granted the defendants' motion to strike the class allegations. *Id.* at 716-17. This Court agrees with Judge Katz that jurisdiction is an issue separate from the class certification matters. Abstention, collateral attack and transfer of venue are also separate and distinct from jurisdiction.

CONCLUSION

The Court concludes that it has subject matter jurisdiction over the issues raised in these proceedings pursuant to 28 U.S.C. §§ 1334(b) and 157 and the Order of Reference of the District Court. These matters are also core proceedings pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order in these proceedings.

IT IS ORDERED that the defendants' motions to dismiss these proceedings for lack of subject matter jurisdiction are DENIED and the remaining issues will be carried for further consideration at a later date to be set by the Court;

IT IS ALSO ORDERED that a further pretrial hearing will be held in these proceedings on *March 14, 2000 at 10:30 a.m.* to determine a schedule for discovery and to set a class certification hearing.

No. 02-1209

Supreme Court, U.S.
FILED
MAR 24 2003
CLERK

In The
Supreme Court of the United States

DAIMLERCHRYSLER SERVICES
NORTH AMERICA LLC,

Petitioner,

v.

MICHAEL F. POWE and
THERESA MOORE BALLARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The underlying bankruptcy adversary proceeding in this case was filed against Chrysler Financial Corporation, L.L.C. ("Chrysler") on June 24, 1999, and was referred to the bankruptcy court as a core proceeding under the standing Order Of Reference entered by the United States District Court for the Southern District of Alabama.

Chrysler initially filed a motion for withdrawal of the reference to the bankruptcy court, which was denied by the district court by Order dated February 28, 2000.

The adversary proceeding against Chrysler is one of six similar bankruptcy class action adversary proceedings that were filed against various defendant secured lenders at that time in the Southern District of Alabama relating to the assessment and collection of certain postpetition attorneys' fees in Chapter XIII cases. On February 15, 2000, Bankruptcy Judge Margaret Mahoney entered an interlocutory order denying defendant Chrysler's motion to dismiss, as well as the other defendants' motions to dismiss in four of the parallel actions, in an Order Concluding That District Court And Bankruptcy Court Have Subject Matter Jurisdiction And That Matters Are Core Proceedings, reported at 244 B.R. 845 (Bkrtcy. S.D. Ala. 2000) (Chrysler Appendix at 124-149) ("February 15, 2000 Order").

Chrysler filed a motion for leave to appeal the February 15, 2000 Order to the district court, and that motion for leave to appeal was denied by the district court on May 1, 2000. *In re Powe*, 2000 WL 726903 (S.D. Ala. 05/01/2000) (Respondents' Appendix at 1-2). The district court considered both the standards recognized under 28 U.S.C. § 1292(b) and the "more relaxed" standards urged

by Chrysler in denying the motion: "Even under the 'more relaxed' standards of Rule 23(f) and 28 U.S.C. § 158(a) asserted by CFC, however, the Court believes that CFC's request for leave to appeal is inappropriate and due to be denied." (Respondents' Appendix at 2).

On March 27, 2000, Chrysler filed a Motion To Dismiss, Or In The Alternative, Motion For Judgment On The Pleadings and filed an Amendment to that Motion on May 12, 2000. On May 25, 2000, the bankruptcy court entered an Order Denying Motion Of Chrysler Financial Corp. L.L.C. For Judgment On The Pleadings.

The adversary proceeding progressed through discovery to a hearing on Chrysler's Motion For Summary Judgment and the Plaintiffs' Motion For Class Certification on April 5, 2001. On June 1, 2001, Bankruptcy Judge Mahoney entered an Order Denying Debtor's Motion To Strike Chrysler's Amended Motion To Strike, Denying Defendant's Motion For Summary Judgment, And Granting Debtor's Motion For Class Certification ("June 1, 2001 Order"), reported at 281 B.R. 339 (Bkrtcy. S.D. Ala. 2001). The June 1, 2001 Order directed the parties to each submit proposed class definitions by July 1, 2001.

On June 11, 2001, Chrysler filed a motion for leave to appeal the June 1, 2001 Order to the district court. On July 11, 2001, the district court entered an Order denying Chrysler's **second** motion for interlocutory appeal.

> The Court concludes that CFC's motion is due to be denied. The Court specifically agrees that, as was true with respect to CFC's first attempt to appeal, the issues sought to be presented on this appeal do not involve 'a controlling question of law as to which there is **substantial** ground for

> difference of opinion . . . **an immediate [resolution of which] may materially advance the ultimate termination of the litigation**.' 28 U.S.C. § 1292(b). The Court further finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that the rulings at issue could escape effective review on appeal after a final judgment.

District Court Order of July 11, 2001 (Chrysler's Appendix at 20) (emphasis by Court in original).

On July 27, 2001, after considering the class definitions proposed by the parties and hearing argument on the issues, Bankruptcy Judge Mahoney entered an Order Defining Class Certified In Case ("July 27, 2001 Class Issues Order"), reported at 280 B.R. 728 (Bkrtcy. S.D. Ala. 2001) (Chrysler's Appendix at 87-90). This order confirmed an initially broad definition for a Rule 23(b)(2) class, with further redefinition to be addressed at trial:

> The definition above closely follows the plaintiff's definition. Chrysler had requested the Court to substantially narrow the definition of class members and create two subclasses. The Court is not narrowing the definition at this point. **If a narrower definition is proved to be appropriate after trial, then the Court will so rule. . . . If trial proof shows that certain states or districts should be excluded from some or all claims, that amendment will be made after trial.**

(Chrysler's Appendix at 88-89) (emphasis added).

On August 6, 2001, Chrysler filed its **third** motion for interlocutory appeal with the district court under 28

U.S.C. § 158(a), seeking to appeal the July 27, 2001 Class Issues Order as well as the June 1, 2001 Order, notwithstanding the fact that interlocutory review of the June 1, 2001 Order was previously denied by the district court on July 11, 2001 and notwithstanding the fact that Chrysler's Motion To Clarify the June 1, 2001 Order was then pending before the bankruptcy court.

Also on August 6, 2001, Chrysler filed a Petition "under Fed. R. Civ. P. 23(f) for leave to appeal" with the Court of Appeals for the Eleventh Circuit, seeking to "challenge both the July 27 Order and the June 1 Order **as well as the district court's orders denying leave to appeal**." Petition (No. 01-90036-D) at 11 (emphasis added).

On August 27, 2001, the district court entered an Order denying Chrysler's **third** motion for interlocutory appeal, the "fourth attempt by [Chrysler] to remove this case from the Bankruptcy Court's jurisdiction."

> The Court concludes that CFC's motion is due to be denied. The Court specifically concludes, as was true with respect to CFC's first attempts to appeal, that the issues sought to be presented on this appeal do not involve 'a controlling question of law as to which there is **substantial** ground for difference of opinion ... **an immediate [resolution of which] may materially advance the ultimate termination of the litigation**.' 28 U.S.C. § 1292(b) (emphasis added [by district court]). The Court once again finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that

> the rulings at issue could escape effective review on appeal after a final judgment.

District Court Order of August 27, 2001 (Chrysler's Appendix at 17-18).

On August 31, 2001, Chrysler filed a Supplement to its Petition before the Eleventh Circuit for the stated purpose "to perfect its earlier petition (if it is required to show that it moved for but was denied leave to appeal under 28 U.S.C. § 158(a)) and to serve as a timely petition under Fed. R. Civ. P. 23(f), if such petition lies only from the district court's order denying leave to appeal and not from the bankruptcy court's class certification order." On September 7, 2001, the Clerk of the Court of Appeals advised the parties by letter that "it appears that this court may lack jurisdiction of this appeal" and directed the parties to address the threshold issue of jurisdiction in a written response to be filed by September 21, 2001.

The trial of the adversary proceeding on the merits took place from December 10, 2001 to December 14, 2001. On May 10, 2002, the bankruptcy court entered an Order Granting Judgment To Chrysler Financial Corporation. *In re Powe*, 278 B.R. 539 and 280 B.R. 734 (Bkrtcy S.D. Ala. 2002) (Chrysler's Appendix at 52-86). In that Order, Judge Mahoney concluded that the intervening December 10, 2001, Eleventh Circuit decision in *In re Welzel*, 275 F.3d 1308 (11th Cir. 2001), defeated the claims of the plaintiffs based on inadequacy of the disclosure of attorney's fee, changing the law as Judge Mahoney had understood it at the time of her prior rulings in the case.

> [W]hereas Powe and his counsel might have objected to hourly rates or types of service rendered or time expended when the fee was postpetition

> but not prepetition, that dichotomy has been ruled baseless in *Welzel*. Therefore, if a creditor discloses that an attorneys fee has been charged regardless of whether Chrysler discloses the fee is prepetition or postpetition, that disclosure is sufficient because the review will be the same.

278 B.R. at 539 (Chrysler's Appendix at 79). Judge Mahoney, applying her interpretation of *Welzel*, concluded that the plaintiff class would have claims only where there had been a total failure to disclose the fee, and that the record as she understood it failed to establish any instances of nondisclosure: "There may have been instances where a fee was charged to a debtor and not disclosed. However, the plaintiffs bore the burden of proving that was the case and the Court has no concrete evidence of nondisclosure." *Id.* at 554 (Chrysler's Appendix at 80). To the extent the plaintiffs asserted claims based on the theory that the flat fees charged by Chrysler's attorneys are per se unreasonable, Judge Mahoney concluded that the issue of reasonableness was "personal to each case or district" and could not be dealt with on a nationwide class basis: "Upon hearing the evidence, the Court concludes that there is insufficient commonality to maintain a class except as to debtors in this district," and she concluded that the "fees as charged by [Chrysler] in this district are reasonable." *Id.*

On May 20, 2002, the plaintiffs filed a Motion To Alter Or Amend the bankruptcy court's Order of May 10, 2002. The plaintiffs argued in the Motion that the bankruptcy court had incorrectly applied the *Welzel* decision and had misinterpreted the evidence insofar as the introduction of proofs of claim containing totally undisclosed attorney's fees was concerned. In an Order Granting In Part Plaintiffs'

Motion To Alter Or Amend The Court's Order of May 10 entered July 3, 2002 (Chrysler's Appendix at 43-51), Judge Mahoney rejected the plaintiffs' arguments regarding the interpretation of *Welzel* but agreed that the record supported the conclusion that the plaintiffs had met the burden of establishing the existence of proofs of claim that did not disclose the existence of attorney's fees.

> Plaintiffs' evidence presented at the hearing on the motion to reconsider showed that only proofs of claim which included an attorneys fee were produced by Chrysler. This fact was reiterated several times by the defendant. . . .
>
> . . .
>
> The Court concludes that it erred in placing the burden of proof on plaintiffs as to the issue of whether undisclosed fees were actually included in the proofs of claim produced by Chrysler. Based upon the parties' agreements and oral and written submissions to the Court, plaintiffs had the right to rely on Chrysler's agreement to produce only proofs of claim with fees included. The Court did not understand the production posture at the time of ruling. Therefore, plaintiffs did meet their burden of proof in their case in chief of showing undisclosed fees in proofs of claim. At that point, in Chrysler's case on defense, it had the burden of proving that any proofs produced that on their face disclosed no fee either did not include a fee or the fee was disclosed or approved in another manner.
>
> The Court will set aside the judgment in order to allow testimony and rebuttal on this single issue as soon as possible. The Court is not reopening the case in any other respect. Evidence will be directed at proving that fees were not undisclosed

> or that if undisclosed fees were included in the proofs of claim they were later disclosed, and rebuttal of the same.

(Chrysler's Appendix at 44, 47).

On July 17, 2002, a panel of the Eleventh Circuit heard oral argument limited by it solely to the issue whether any jurisdiction to entertain Chrysler's August 6, 2001 Rule 23(f) Petition (No. 01-90036-D) existed. Even though the bankruptcy court's orders of June 1, 2001 and July 27, 2001 that were the subject of the August 6, 2001 Petition had been superseded by the bankruptcy court's orders of May 10, 2002 and July 3, 2002, Chrysler insisted to the Eleventh Circuit, in a "Second Notice of Recent Developments in Bankruptcy Court" filed July 9, 2002, that "both the underlying case and this appeal [of the superseded 2001 orders] are very much alive."

On July 26, 2002, Chrysler filed with the bankruptcy court a Motion For Reconsideration And Amendment Of The Court's Order of July 3, 2002, ("Chrysler Reconsideration Motion") and a Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings. ("Chrysler Standing Motion"). The core of the Chrysler Reconsideration Motion was Chrysler's insistence that Chrysler's attorneys had made no agreement as to what type of documents it was producing and that plaintiffs' attorneys had no right to rely on the statements made about what was being produced, conceding only that "some overproduction occurred where Plaintiffs were not notified." Chrysler Reconsideration Motion at 2. Judge Mahoney denied the Chrysler Reconsideration Motion in an August 23, 2002 Order Denying Motion For Reconsideration And

Amendment Of The Court's Order of July 3, 2002 ("Reconsideration Denial Order") (Chrysler's Appendix at 38-42). Judge Mahoney concluded that the evidence adduced by the plaintiffs clearly established the agreement of Chrysler's counsel and the right of plaintiffs' counsel to rely on that agreement:

> The Court stated that CFC and the plaintiffs had an agreement that CFC would produce only proofs of claim that included attorneys fees when it answered plaintiffs' discovery requests. The Court believes, from the evidence provided at the last hearing, that the word 'agreement' correctly describes the parties' postures. CFC's attorneys indicated in all communications with plaintiffs that it was providing only proofs of claim with fees. The plaintiffs agreed to this limitation on disclosure. The plaintiffs' original requests were for broader production. Another word that might describe the situation as well is 'understanding.' The fact is that the plaintiffs had a right to rely on CFC's statements as to what was being produced. There was no convincing contrary evidence produced to show that CFC did not tell plaintiffs that it was producing only claims with fees. Therefore, whether the facts present an 'agreement' or an 'understanding' or a fact pattern in which, even without a formal agreement, plaintiffs had a right to rely on CFC statements, the Court's decision is the same. The word will not be changed in the order.

(Chrysler's Appendix at 39-40). Also on August 23, 2002, Judge Mahoney entered an Order Denying Chrysler's Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings ("Representative Standing Order") (Chrysler's

Appendix at 29-37). The bankruptcy court's view is that, depending on what the evidence establishes with respect to the single open factual issue of whether a group of proofs of claim produced by Chrysler in fact involved undisclosed fees, viable class claims may or may not still be present:

> Chrysler makes an issue of the fact that the class has been decertified. This was due to the Court's erroneous understanding of the claims produced at trial. The Court concluded that there were no undisclosed fees. As the evidence now stands based upon the Court's reconsideration of its ruling, there **may be** undisclosed fees. **If there are**, those claims are part of the previously certified class. The Court is reconstituting the class in this order.

(Chrysler's Appendix at 35-36) (emphasis added). The Representative Standing Order provides that "the class of plaintiffs previously certified on July 27, 2001 is **reconstituted based on the Court's ruling in its order of July 3, 2002 and this order**." (Chrysler's Appendix at 37) (emphasis added.) It is clear from a reading of the July 3 Order and the Representative Standing Order that should Chrysler prevail on the single open evidentiary issue of whether some of its proof of claims involve undisclosed attorney's fees, the bankruptcy court will re-enter the May 10 Order Granting Judgment To Chrysler Financial Corporation in its entirety.

Rather than expedite discovery and hearing on the single open evidentiary issue, Chrysler elected to file its **Fourth** Motion For Leave To Appeal to the District Court pursuant to 28 U.S.C. § 158(a) with respect to the Reconsideration Denial Order and the Representative Standing

Order, seeking for the **fifth** time to take the case away from the bankruptcy court. At the very same time, it simultaneously filed the Second Chrysler 23(f) Petition (No. 02-90035) with the Eleventh Circuit seeking interlocutory review of the very same Reconsideration Denial Order and the Representative Standing Order.

On September 3, 2002, Chrysler's **Fourth** Motion For Leave To Appeal And Motion For Stay was dealt with by Judge Mahoney in an Order Denying Motion For Leave To Appeal And Motion For Stay ("September 3 Order") (Respondents' Appendix at 3-4). The September 3 Order was a disposition by the bankruptcy court of the Motion for Stay as required under Bankruptcy Rule 8005 and incorporates the bankruptcy court's report and recommendation insofar as the Motion For Leave To Appeal is concerned:

> This Court has concluded that the case needs to be tried and completed. Chrysler asserts that the Court's ruling was incorrect. What Chrysler does not point out is that the case would have been completed and finally decided with all issues taken into account if the Court had been clear about the documents produced by Chrysler that the plaintiff class offered as evidence. If the proofs of claim contain completely undisclosed postpetition attorneys fees, then the class should be awarded injunctive relief. The fees should be expunged from class members accounts and refunds given. If the proofs of claim include fees that were disclosed in the proof or otherwise, then the class will be denied relief. . . .
>
> The trial of this matter will not take much time and the court is prepared to hold the trial as soon as the parties can be ready. There are only a limited

> number of law firms, if any, that may have charged fees that were completely undisclosed.

(Respondents' Appendix at 3-4). On September 26, 2002, the district court entered an Order denying Chrysler's Fourth Motion For Leave To Appeal, in which it noted that by the Motion Chrysler "seeks for the fifth time (the fourth time by appeal) to remove this case from the Bankruptcy Court's jurisdiction."

> The Court specifically concludes, as was true with respect to CFC's first three attempts to appeal, that the issues sought to be presented on this appeal do not involve 'a controlling question of law as to which there is **substantial** ground for difference of opinion ... **an immediate [resolution of which] may materially advance the ultimate termination of the litigation**.' 28 U.S.C. § 1292(b) (emphasis added [by district court]). The Court once again finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that the rulings at issue could escape effective review on appeal after a final judgment.

(Chrysler's Appendix at 15).

On November 19, 2002, the court of appeals released its opinion in Case No. 01-90036-D, concluding that there is no statutory authority under 28 U.S.C. §§ 1292(e) & 2072 for the incorporation of Rule 23(f) of the Federal Rules of Civil Procedure, which allows discretionary appeals to the circuit court of orders granting or denying class certification, into the Bankruptcy Rules. The conclusion was based both on the court's construction of the rule-making jurisdiction conferred by 28 U.S.C. § 1292(e) and

its recognition that application of Rule 23(f) to bankruptcy proceedings would create simultaneous and conflicting interlocutory appellate jurisdiction in the court of appeals under Rule 23(f) and the district court under 28 U.S.C. § 158(a). Because of its disposition of the Petition on jurisdictional grounds, the court of appeals did not reach "the timeliness or mootness issues of Chrysler Financial Corporation's petition," the issue of how Rule 23(f) would be read and implemented under Bankruptcy Rule 9002 if Rule 23(f) were to be held properly incorporated into the Bankruptcy Rules, or the issue whether the established criteria for the allowance of a discretionary appeal under Rule 23(f) as described in *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000) could have been demonstrated by Chrysler in any event. 312 F.3d 1241 (11th Cir. 2002) (Chrysler Appendix at 1-11).

On January 10, 2003, the court of appeals dismissed the second Chrysler 23(f) Petition (No. 02-90035) for lack of jurisdiction on the authority of its November 19, 2002 ruling.

Although not integral to the status of this case, Chrysler's Petition contains material misstatements of fact relating to the status of the five parallel class action adversary proceedings filed in the Southern District of Alabama. At page 23 of the Petition, Chrysler states: "Of the six adversary proceedings in the Southern District of Alabama from which similar Rule 23(f) petitions were filed in the court of appeals, only this one survives. All the rest have settled or had final judgment entered."

Rule 23(f) petitions were filed in four cases, not six. In addition to the Chrysler petitions, a Rule 23(f) petition was filed in *First Union Mortgage Corporation v. Dean*

(Case No. 01-90039-B), which was disposed of by the Eleventh Circuit's November 19, 2002 ruling. The *First Union* case is currently on appeal to the district court from a judgment entered in favor of the plaintiff class against First Union Mortgage Corporation.

A Rule 23(f) petition was filed in *Smith v. PNC Mortgage Corp. of America* (Case No. 01-90060-C), which was disposed of by the Eleventh Circuit's November 19, 2002 ruling. A settlement was subsequently reached, and a motion for approval of the settlement is currently pending.

Two Rule 23(f) petitions were filed in *Noletto v. Nationsbanc Mortgage Corp.* (Case Nos. 01-90035 and 01-90045) but terms of settlement were reached prior to consideration of the petitions, and the petitions were withdrawn. A class settlement has been finally approved by the bankruptcy and district courts in the case.

Rule 23(f) petitions were never filed in *Sheffield v. Homeside Lending, Inc.*, Adversary No. 99-1124, or *Slick v. Norwest Mortgage, Inc.*, Adversary No. 99-1136. Terms of settlement were reached in *Sheffield* on the morning of trial and in *Slick* after trial and entry of judgment against the defendant. Class settlements have been finally approved by the bankruptcy and district courts in both cases.

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Present An Important Question Of Federal Law

A. The Petition Has Been Filed For The Purpose Of Further Delaying And Obstructing The Resolution Of This Case

The underlying adversary proceeding here was filed almost four years ago. Chrysler immediately sought to have the case removed from the bankruptcy court with a withdrawal of reference motion, which was denied by the district court. Chrysler subsequently filed four (4) separate motions for permission to take interlocutory appeals to the district court pursuant to 28 U.S.C. § 158(a), each and every one of which having been emphatically denied by the district court. Simultaneously with the filing of its last two § 158(a) motions with the district court, Chrysler also filed petitions with the Court of Appeals for the Eleventh Circuit seeking interlocutory review of the same bankruptcy court orders under Fed. R. Civ. P. 23(f) and Bankruptcy Rule 7023. From the determination of the court of appeals that Rule 23(f) has not been incorporated into the Bankruptcy Rules, Chrysler has filed the present petition for certiorari. Rather than addressing and resolving the sole factual issue that stands between Chrysler and a decision of the bankruptcy court fully in its favor on the merits, "[t]he trial of [which issue] will not take much time and [as to which] the [bankruptcy] court is prepared to hold the trial as soon as the parties can be ready," Chrysler continues its efforts to multiply proceedings and frustrate final resolution in the bankruptcy court. Chrysler's tactical approach to this litigation continues to demonstrate the very reasons why interlocutory appeals are discouraged.

> We reiterate, however, that interlocutory appeals are inherently "disruptive, time-consuming, and expensive," [citation omitted] and consequently are generally disfavored. Piecemeal appellate review has a deleterious effect on judicial administration. It increases the workload of the appellate courts, to the detriment of litigants and judges. It requires the appellate courts to consider issues that may be rendered moot if the appealing party ultimately prevails in or settles the case. It undermines the district court's ability to manage the action. And it creates opportunities for abuse by litigants seeking to delay resolution of a case by raising with the appellate court objections to the scope of an order that should have been raised first with the district court itself. Most of these concerns are, if anything, even more compelling in the class action context, especially given the district court's broad authority under Rule 23(c)(1) to monitor and if necessary reconsider its class certification decision as discovery unfolds and the action progresses to trial.
>
> We will therefore use restraint in accepting Rule 23(f) petitions, and these interlocutory petitions will not be accepted as a matter of course.

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1276-77 (11th Cir. 2000).

B. In This Case Rule 23(f) Would Provide At Most A Means Of Seeking Interlocutory Review, Not A Means Of Obtaining Interlocutory Review

Rule 23(f) does not confer a right to interlocutory review as intimated by Chrysler; rather, it at most provides an opportunity to request interlocutory review, the

grant of which is entirely discretionary with the court of appeals. As noted above, Rule 23(f) petitions are viewed with skepticism by the Eleventh Circuit and application of the criteria applied by the Eleventh Circuit in considering Rule 23(f) virtually assures that Chrysler's Petitions, even if they were not moot, would be denied by the Eleventh Circuit. In formulating "guideposts" for the exercise of its "discretion" to hear interlocutory appeals of district court class issue orders under Rule 23(f), the Eleventh Circuit has identified and discussed five areas of inquiry:

> **First, and most important, the court should examine whether the district court's ruling is likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant.** The prospect of irreparable harm from delaying appellate review of the class certification decision until after final judgment undoubtedly creates a compelling need for immediate review. Nevertheless, even ordinary class certification decisions by their very nature may radically reshape a lawsuit and significantly alter the risk-benefit calculation of the parties, leading to claims of irreparable harm. **For that reason, the decision to grant interlocutory review based primarily on this factor generally should be limited to those cases where the district court's ruling, as a practical matter, effectively prevents the petitioner from pursuing the litigation. This might be the case where a denial of class status means that the stakes are too low for the named plaintiffs to continue the matter, or where the grant of class status raises the cost and stakes of the litigation so substantially that a rational defendant would feel irresistible pressure to settle. . . . We anticipate**

> **that the number of decisions truly warranting immediate review on this basis alone will be small.**

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1274 (11th Cir. 2000) (emphasis added).

It would be impossible for Chrysler to contend at this stage of the litigation that the denial of interlocutory review would be the death knell for its contest of this case.

> **Second, a court should consider whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion.** Ordinarily, the appropriateness of allowing a rule 23(f) appeal should turn on more than the outcome of a preliminary debate about the merits of the district court's ruling. Interlocutory review may be appropriate when it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on an appeal after final judgment. . . . **Typically, however, class certification decisions require the application of broad and flexible legal standards to unique and complex sets of facts that do not fit squarely within prior precedent. Due to the highly fact-sensitive nature of this inquiry, district courts are given wide latitude to decide whether and how to certify a class, and appellate scrutiny of such decisions is limited at any stage. Accordingly, merely demonstrating that the district court's ruling is questionable generally will be insufficient to support a Rule 23(f) petition in the absence of other factors**

> **supporting immediate review. *See Armstrong*, 138 F.3d at 1386 ("class certification decisions are left to the sound discretion of the district court, and in most cases the certification order can be effectively reviewed on appeal after final judgment.")**

Id. at 1274-75 (italics in original; emphasis added).

> Third, a court should consider whether the appeal will permit the resolution of an unsettled legal issue that is "important to the particular litigation as well as important in itself." *Mowbray*, 208 F.3d at 294. . . . **We reiterate, however, that a class certification decision which "turns on case-specific matters of fact and district court discretion," Comm. Note, Fed.R.Civ.P. 23 – as most certification decisions indisputably do – generally will not be appropriate for interlocutory review.**

Id. at 1275 (emphasis added).

> Fourth, a court should consider the nature and status of the litigation before the district court. Some cases plainly will be in a better pretrial posture for interlocutory appellate review than others. As noted above, the propriety of granting or denying a class, as well as the proper scope of any class that has been granted, may change significantly as new facts are uncovered through discovery. **Similarly, a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision. Moreover, a district court's ruling on dispositive motions or a motion to add new class representatives, parties, or claims may significantly redefine the issues in the case**

> **and thereby affect the scope of or need for a class. Accordingly, the decision on a Rule 23(f) petition may take into account such considerations as the status of discovery, the pendency of relevant motions, and the length of time the matter already has been pending.**

Id. at 1276 (emphasis added).

> **Finally, a court should consider the likelihood that future events may make immediate appellate review more or less appropriate. Simply by way of example, settlement negotiations involving some or all of the parties affected by the decision, or the prospect of an imminent change in the financial status of a party (such as a bankruptcy filing) may caution against hearing an interlocutory appeal.** Conversely, if the case is likely to be one of a series of related actions raising substantially the same issues and involving substantially the same parties, then early resolution of a dispute about the propriety of certifying a class may facilitate the disposition of future claims. **Also significant is whether the district court itself has indicated that it views its class certification decision as conditional or subject to revision at a later stage in the case.**

Id. (emphasis added).

Chrysler's suggestion that the Eleventh Circuit would be eager to address the issue whether "a bankruptcy judge [may] certify a class that includes debtors whose bankruptcy cases are or were filed in other districts" (Petition at 9) is particularly unpersuasive given the fact that the

Eleventh Circuit has already declined the opportunity to address this very issue on an interlocutory basis. In *Bank United v. Manley*, 273 B.R. 229 (N.D. Ala. 2001), a decision cited by Chrysler, the district court, in a comprehensive opinion, specifically affirmed a bankruptcy court's determination that it had jurisdiction to certify a nationwide class of debtors in an appropriate case. At the request of the affected defendants, the district court in *Manley* certified the issue for immediate appeal under 28 U.S.C. § 1292(b). The Eleventh Circuit denied the request for interlocutory appeal in *Manley*. (Case No. 01-90059-I) (Respondents' Appendix at 5-6).

C. Chrysler's Petition In Case No. 01-90036-D Is Moot And Chrysler's Petition In Case No. 02-90035 Will Be Moot Before Chrysler's Petition To This Court Would Be Heard

As noted above, Chrysler's petition for interlocutory appeal to the court of appeals in Case No. 01-90036-D related to the July 27, 2001 Class Issues Order entered by the bankruptcy court. Subsequent to the entry of that Order, trial on the merits occurred in the bankruptcy court in December, 2001, and the July 27, 2001 Class Issues Order was modified and superseded first by the May 10, 2002 Order Granting Judgment To Chrysler Financial Corporation and then by (a) the July 3, 2002 Order Granting In Part Plaintiffs' Motion To Alter Or Amend the Court's Order of May 10, (b) the August 23, 2002 Order Denying Motion For Reconsideration And Amendment Of The Court's Order of July 3, 2002, and (c) the August 23, 2002 Order Denying Chrysler's Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings.

Chrysler is requesting that this Court grant certiorari and ultimately direct that the court of appeals should now exercise jurisdiction to determine on a discretionary basis whether it should entertain an interlocutory appeal as to a class certification order that has been superseded and modified after trial on the merits by four subsequent orders of the trial court. The Petition in Case No. 01-90036-D is now moot, and Chrysler is requesting the Court to exercise certiorari jurisdiction to render a purely advisory opinion as to that Petition.

Chrysler's Petition in Case No. 02-90035 related to the bankruptcy court's August 23, 2002 Order Denying Motion For Reconsideration And Amendment Of The Court's Order of July 3, 2002, and to the bankruptcy court's August 23, 2002 Order Denying Chrysler's Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings. Those orders make it clear that there is only a single open evidentiary issue remaining in the case before the bankruptcy court. The bankruptcy court noted in its September 3, 2002 Order that "[t]he trial of this matter will not take much time and the court is prepared to hold the trial as soon as the parties can be ready." The sole delaying factor has been Chrysler's continuing resistance to discovery. If the Court were to grant certiorari and schedule the matter for consideration as to the Petition in Case No. 02-90035, the trial of the last remaining issue will have been concluded in the bankruptcy court and the case will almost certainly be on appeal to the district court long before this Court will have had time to reach a decision. Inevitably, any decision rendered with respect to Case No. 02-90035 would also be only an advisory opinion by the time the decision is reached.

II. The Court of Appeals' Decision Is Not Erroneous.

In response to the jurisdictional issue raised sua sponte by the court of appeals, the plaintiffs advanced the position that Rule 23(f) did not confer a basis for interlocutory review of class certification orders entered by bankruptcy judges under either an analysis of the rule-making jurisdiction conferred by statute or under an analysis of the implementation of rule language if jurisdiction were to be found. The court of appeals reached only the statutory analysis, concluding that "there is no statutory authority under §§ 1292(e) and 2072 for the incorporation of Rule 23(f) into the Bankruptcy Rules." For the reasons set out at length in the court of appeals' opinion, this conclusion is correct.

Moreover, even if Rule 23(f) were found to have been effectively incorporated into the Bankruptcy Rules, the implementation of the language of the Rule as directed by Bankruptcy Rule 9002 would separately result in the conclusion that no petition to the court of appeals could be brought. The court of appeals in footnote 3 to its opinion sketches the resulting language if Rule 23(f) were read as incorporated into Bankruptcy Rule 7023 in the manner directed by Bankruptcy Rule 9002. By operation of Rule 9002(2), the word "appeal" appearing in the Federal Rules of Civil Procedure made applicable by operation of the Bankruptcy Rules is to be read as "an appeal as provided by 28 U.S.C. § 158," which expressly contemplates interlocutory appeals from the bankruptcy court only to the district court. In order to create a field of operation for Rule 23(f) if it were to be engrafted on Bankruptcy Rule 7023, the court of appeals would have to determine that the definition specified to be used in Bankruptcy Rule 9002(2) should be ignored as "inconsistent with the context" and

would have to fashion a different meaning out of whole cloth. The effect of such a rewriting of the Bankruptcy Rule would be to create a duplication through Rule 23(f) of "an appellate avenue . . . already available to petitioners through an interlocutory appeal to the district court."

The most compelling observation underscoring the correctness of the court of appeals' opinion is its "real world" analysis of the result if both Rule 23(f) and 28 U.S.C. § 158(a) were found to be simultaneously available as separate avenues for seeking interlocutory review of a class order entered by a bankruptcy judge.

> Furthermore, if Rule 23(f) were applied to class certification orders in bankruptcy, litigants could appeal such orders simultaneously to the district court pursuant to 28 U.S.C. § 158(a) and to the court of appeals pursuant to Bankruptcy Rule 7023(f). That scenario, needless to say, is fraught with uncertainty.[7]
>
> > [7] For instance, there would be confusion regarding the status of the district court's jurisdiction over an appeal of a bankruptcy judge's class certification order if and when the court of appeals exercises Rule 7023(f) jurisdiction, and, if the district court retains such jurisdiction, the risk of inconsistent determinations.
>
> Therefore, we also find practical value in recognizing that §§ 1292(e) and 2072 do not permit incorporation of Rule 23(f) into the Bankruptcy Rules.

312 F.3d at 1246 (Chrysler Appendix at 10).

Chrysler's Petition contains the remarkable assertion that "the risk of simultaneous appeals of the same order under both § 158(a) and Rule 23(f) is more theoretical than real." (Petition at 20-21). Given the fact that **Chrysler has already filed simultaneous motions for permissive appeal under both §158(a) and Rule 23(f) not once, but twice, in this case**, one must assume that Chrysler is drawing a distinction between simultaneous motions for permission to appeal and simultaneous appeals themselves. The reality proven by Chrysler's own tactics is that a litigant bent on disrupting the orderly process of the case can be counted on to file duplicative motions for interlocutory appeal with every court that will accept them. The further prospect is that adversary parties who were both dissatisfied with a bankruptcy judge's ruling on class issues for different reasons might each file a motion for permissive appeal of the ruling to whichever court it felt was more likely to favor its petition. Chrysler's simplistic faith in the ability of district and circuit courts to spontaneously fashion a "first in time, first in right" rule of deference between themselves is equally remarkable: "One court can simply deny review if another court has granted it." (Petition at 21). Chrysler does not explain how one court is to remain continuously apprised of what the other court has done, or refused to do, with respect to a motion for permissive appeal while deciding what it itself desires to do with a parallel motion dealing with the identical bankruptcy court ruling. More to the point of its argument, Chrysler does not explain why the purportedly intentional creation of a "needed means of appellate review" at the court of appeals level "to permit the early development of binding precedent on . . . fundamental issues," "to bring order and binding precedent to the increasingly active field of class action litigation in

bankruptcy" would itself contemplate preemption of consideration of a motion by the court of appeals due to the grant of a § 158(a) motion by the district court, before the court of appeals could act on the parallel Rule 23(f) motion before it.

In creating the appellate structure of the bankruptcy system, Congress took great pains in enacting 28 U.S.C. § 158(d) to limit the appellate jurisdiction of the courts of appeal to "final decisions, judgments, orders, and decrees" of district courts and bankruptcy appellate panels only. With 28 U.S.C. § 158(a), Congress vested interlocutory appellate jurisdiction exclusively in the district courts to hear appeals "with leave of the court, from other interlocutory orders and decrees of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of [title 28]." In 1992, Congress amended section 1292 of title 28, which deals generally with the jurisdiction of courts of appeals over interlocutory appeals from district court orders by adding subsection (e) to authorize the Supreme Court to "prescribe rules in accordance with section 2072 of [title 28]" providing for "an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under the rest of § 1292. By enacting §1292(e), Congress did not repeal § 158(d) or delete the jurisdiction over interlocutory appeals from bankruptcy orders previously vested in district courts under § 158(a). The limiting reference to "rules in accordance with section 2072" is a clear indication that Congress did not intend to confer on the Supreme Court the power to amend § 158 by rulemaking. As noted by the court of appeals, "[a]s § 2072 grants the Supreme Court substantive powers to prescribe rules for district courts and courts of appeals, its constraint upon authorizing the

prescription of rules for interlocutory appeals under § 1292(e) must be read to apply to the same extent or mean nothing at all." 312 F.3d at 1244 (Chrysler Appendix at 7). The limiting reference to "rules in accordance with section 2072" is particularly understandable in the context of the inapplicability of Rule 23(f) interlocutory appeals here because, in the words of the court of appeals, "the appellate avenue addressed by Rule 23(f) is already available to petitioners through an interlocutory appeal to the district court." *Id.* at 1246 (Chrysler Appendix at 9).

III. CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 24, 2003

APPENDIX

United States District Court,
S.D. Alabama
Southern Division.

In re: Michael F. POWE, Debtor,
Michael F. POWE, Plaintiff,
v.
CHRYSLER FINANCIAL CORPORATION, Defendant.

No. CIV. A. 00-0283-BH-L.

May 1, 2000.

Steve Olen, Esq., Olen, Nicholas & Copeland P.C., Mobile.
C. Lee Reeves, Esq., Sirote & Permutt, P.C., Birmingham.
Michael Edwin Gabel, Esq., Sirote & Permutt, P.C., Mobile.

ORDER

HAND, Senior District J.

Chrysler Financial Corporation (CFC) now seeks leave to appeal an interlocutory Order entered by the Bankruptcy Court on February 15, 2000, denying CFC's motion, as well as the comparable motions to dismiss filed by the defendants in five similar class action adversary proceedings, to dismiss the debtor's/plaintiff's class claims for lack of jurisdiction and declaring that this Court and the Bankruptcy Court have subject matter jurisdiction over the class claims. All issues relating to the propriety of certification of a class other than subject matter jurisdiction were, under the February 15 Order, carried forward "for further consideration at a later date to be set by the Court." CFC asks this Court to review the interlocutory February 15 Order under 28 U.S.C. S 158(a)(3), which it contends is a "more relaxed and liberal application of the

standard under 28 U.C.S. S 1292(b)." CFC's Reply Brief (Doc. 3) at 7.

Upon consideration of CFC's motion, plaintiff's brief in opposition thereto (Bankr.Doc. 32), CFC's Reply (Doc. 3) and all other pertinent portions of this record, the Court concludes, for the reasons stated in both the subject Order of February 15 and plaintiff's brief in opposition, that the motion for leave to appeal is due to be denied. The Court specifically agrees that the issues presented on this appeal, absent any certification of a class or definition of the scope of the class, do not involve "a controlling question of law as to which there is substantial ground for difference of opinion ... an immediate [resolution of which] may materially advance the ultimate termination of the litigation." 28 U.S.C. S 1292(b). The Court also concludes, despite CFC's contentions to the contrary, that "[t]he standards for granting leave from an interlocutory order of the bankruptcy court are guided by [§ 1292(b)] the statute governing interlocutory appeals from the district court to the circuit court." See e.g., In re MCorp Financial, Inc., 139 B.R. 820, 823 (S.D.Tax.1992). Even under the "more relaxed" standards of Rule 23(f) and 28 U.S.C. § 158(a) asserted by CFC, however, the Court believes that CFC's request for leave to appeal is inappropriate and due to be denied.

It is therefore ORDERED that the motion for leave to appeal be and is hereby DENIED and that this action be returned to the Bankruptcy Court forthwith.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re
MICHAEL F. POWE
Debtor.

Case No.
98-10935-MAM-13

MICHAEL F. POWE, et al.,
Plaintiff,

v.

Adv. No. 99-1121

CHRYSLER FINANCIAL CORPORATION
Defendant.

ORDER DENYING MOTION FOR LEAVE TO APPEAL AND MOTION FOR STAY

This case is before the Court on the motion of Chrysler Financial Corporation for leave to appeal and for a stay pending appeal. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. If it is not a core proceeding the Court reports and recommends to the District Court that it deny this motion pursuant to Fed. R. Bankr. P. 9033. The Court is denying the motion.

This case has been pending for three years. Other motions for leave to appeal and for stays pending appeal have been filed and been denied. This Court has concluded that the case needs to be tried and completed. Chrysler asserts that the Court's ruling was incorrect. What Chrysler does not point out is that the case would have been completed and finally decided with all issues

taken into account if the Court had been clear about the documents produced by Chrysler that the plaintiff class offered as evidence. If the proofs of claim contain completely undisclosed postpetition attorneys fees, then the class should be awarded injunctive relief. The fees should be expunged from class members accounts and refunds given. If the proofs of claim include fees that were disclosed in the proof or otherwise, then the class will be denied relief. This opinion is consistent with the rulings by the court in this and other cases to date. *Slick v. Norwest Mortgage, Inc.* (*In re Slick*), Ordering Awarding Judgment to the Plaintiffs, Case No. 98-14378-MAM-13, Adv. No. 99-1136 (Bankr. S.D. Ala. June 24, 2002); *Harris v. First Union Mortgage Corp* (*In re Harris*), Order Awarding Judgment to the Plaintiffs, Case No. 96-14029, Adv. No. 99-1144 (Bankr. S.D. Ala. June 24, 2002). This issue is on appeal in at least one other case already. The trial of this matter will not take much time and the court is prepared to hold the trial as soon as the parties can be ready. There are only a limited number of law firms, if any, that may have charged fees that were completely undisclosed.

For the reasons indicated above, the Court concludes that the motions should be denied.

IT IS ORDERED that the motion of Chrysler Financial Corporation, defendant, is DENIED.

Dated: September 3, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-90056-I

COUNTRYWIDE HOME LOANS, INC.,

Petitioner,

versus

MARY E. MORROW,

Respondent.

No. 01-90057-I

FLEET MORTGAGE GROUP, INC.,

Petitioner,

versus

JOHNNY T. LITTLE,

Respondent.

No. 01-90058-I

GE CAPITAL MORTGAGE SERVICES, INC.,

Petitioner,

versus

WILBURN B. AND CLARSIE M. HAGER,

Respondents.

No. 01-90059-I

BANK UNITED,

Petitioner,

versus

JESSIE M. MANLEY,

Respondent.

On Petition for Permission to Appeal from the
United States District Court for the
Northern District of Alabama

BEFORE: ANDERSON, Chief Judge, BLACK and MARCUS, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is **DENIED**.